Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1998

EARL FOREMAN, et al.,

Petitioners,

vs.

AS MID-AMERICA, INC., A Corporation,

Respondent.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether nonunion replacement workers' state law breach of contract claims, alleging the breach of an employer's promises of permanent employment in a harassment-free workplace, are preempted by the National Labor Relations Act, in contravention of this Court's holding in *Belknap v. Hale*?

Whether nonunion replacement workers' state law breach of contract claim for third party beneficiary rights arising out of an agreement between an employer and its unions that "there shall be no intimidation, discrimination or harassment," is preempted by Section 301 of the Labor Management Relations Act?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

I. THE NEBRASKA SUPREME COURT'S DECISION IS CONTRARY TO THIS COURT'S POLICY ON FEDERAL LABOR LAW PREEMPTION AND DEPRIVES PLAINTIFFS OF THEIR RIGHTS UNDER STATE LAW 9

A. THE NEBRASKA SUPREME COURT'S DECISION THAT PLAINTIFFS' CLAIMS ARE PREEMPTED UNDER THE NLRA IS IN DIRECT CONFLICT WITH THIS COURT'S HOLDING IN *BELKNAP v. HALE* 12

1. Plaintiffs' Claims Are Indistinguishable From Claims Held Not Preempted In *Belknap* 16

B. IN THIS CASE OF FIRST IMPRESSION, THE COURT MUST DECIDE WHETHER NONUNION REPLACEMENT WORKERS' STATE LAW CLAIMS SURVIVE PREEMPTION UNDER SECTION 301 OF THE LMRA 21

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) 22, 25, 26

Automobile Workers v. Russell, 356 U.S. 634 (1958) 16

Baldwin v. Pirelli Armstrong Tire Corp., 927 F. Supp. 1046 (M.D. Tenn. 1996) 22

Belknap, Inc. v. Hale, 463 U.S. 491 (1983)..... *passim*

Branson v. Greyhound Lines, Inc., 126 F.2d 747 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 1362 (1998)....13, 22

Brewton Fashions, Inc., a Division of Judy Bond, 145 N.L.R.B. 99 (1963), *enf'd*, 361 F.2d 8 (5th Cir.), *cert. denied*, 385 U.S. 842 (1966) 13, 14, 15

Building & Trades Council v. Associated Builders & Contractors of Mass./Rhode Island, 507 U.S. 218 (1993) 17

Campbell v. Lockheed Shipbuilding & Constr., 785 P.2d 459 (Wash. Ct. App. 1990) 13

Caterpillar Inc. v. Williams, 482 U.S. 386 (1987)..... 28

Chemical Workers v. Pittsburgh Glass, 404 U.S. 157 (1971) 26

Copps Food Center, Inc. v. Local No. 73A, 733 F. Supp. 304 (W.D. Wis. 1990)..... 24

Construction Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954) 16

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 8

TABLE OF AUTHORITIES – Continued

Page

Farmer v. Carpenters, 430 U.S. 290 (1977) 12, 15, 16, 19, 20

Franchise Tax Board v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1 (1983) 16

Hazen v. Western Union Telegraph Co., 518 F.2d 766 (6th Cir. 1975) 26

Iron Workers v. Perko, 373 U.S. 701 (1963) 15

Justice v. Union Carbide Corp., 405 F. Supp. 920 (E.D. Tenn. 1975), *aff'd*, 551 F.2d 1078 (6th Cir. 1976) 26

Kelecheva v. Multivision Cable T.V. Corp., 22 Cal. Rptr. 2d 453 (Cal. Ct. App. 1993) 13

Leveld Wholesale, Inc., 218 N.L.R.B. 1344 (1975) 24

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988) 26, 27

Linn v. Plant Guard Workers, 383 U.S. 53 (1966) ... 15, 16

Livadas v. Bradshaw, 512 U.S. 107 (1994) .. 22, 25, 26, 27

Local 926, Int'l Union of Operating Engineers v. Jones, 460 U.S. 669 (1983) 15, 16

Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976) 17

Newport News Shipbuilding & Dry Dock Co., 236 N.L.R.B. 1499 (1978) 13, 14, 15

Retail Clerks Internat'l Ass'n v. Lion Dry Goods, 369 U.S. 17 (1962) 23, 24

TABLE OF AUTHORITIES – Continued

Page

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 15, 16, 17

Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978) 12, 15, 16, 19, 20

Service Elec. Co., 281 N.L.R.B. 633 (1986) 24

Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 25

White v. National Steel Corp., 938 F.2d 474 (4th Cir. 1991) 13

Youngdahl v. Rainfair, 355 U.S. 131 (1957) 16

STATUTES

28 U.S.C. § 1257(a) (1998) 1, 8

29 U.S.C. § 157 (1998) 1, 8

29 U.S.C. § 158(a) (1998) 1, 8

29 U.S.C. § 185(a) (1998) 2, 8

OTHER AUTHORITIES

II The Developing Labor Law (Patrick Hardin ed., 3d ed. 1992) 11

OPINIONS BELOW

The opinion of the Nebraska Supreme Court (App. 1-34, *infra*) is reported as *Earl Foreman et al. v. AS Mid-America, Inc.*, 255 Neb. 323, ___ N.W.2d ___ (1998), and is reproduced in Appendix A to this petition.[1] The Order of the District Court of Lancaster County, Nebraska (App. 35-41, *infra*), reproduced in Appendix B, is unreported.

JURISDICTION

The opinion and judgment of the Nebraska Supreme Court was entered on September 25, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1998).

STATUTES INVOLVED

The statutes involved are the National Labor Relations Act, 29 U.S.C. §§ 157 & 158(a) (1998), and Section

[1] This case consists of fourteen separate actions against AS Mid-America, Inc., which were consolidated for purposes of briefing and oral argument on appeal in the Nebraska Supreme Court. The names of the other plaintiffs are Dene Dixon, Larry Masters, Michael Riggs, Brian Faust, Ralph Chloupek, Jeffery Reedy, Michael Werger, Raymond Thomason, Kenneth Chloupek, Paul Rada, Jerry Study, Kent Watson, Jr., and Lynn Dowding. Petitioners wish to remain consolidated for purposes of appeal to this Court. Graphic Communications International Union, Local No. 543-M and Graphic Communications International Union, Local No. 221 are Third-Party Defendants in the district court actions but not parties to the appeal.

301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1998). The pertinent text of these statutes is set forth in Appendix C. (App. 42-43, *infra*).

STATEMENT OF THE CASE

On or about April 27, 1993, approximately 690 union employees at Defendant AS Mid-America, Inc.'s commercial printing plant in Lincoln, Nebraska, went on strike. In an effort to continue its operations during the strike, the Defendant sought to hire permanent replacement and crossover workers to fill their positions. Plaintiffs are all nonunion employees who were hired by Defendant AS Mid-America during the strike as permanent replacement workers in April and May, 1993.[2]

To induce Plaintiffs into accepting a position with the Defendant during the strike and continue working after the strike was settled, Defendant promised Plaintiffs that they would have a permanent job, that they could work at Defendant's plant for as long as they wanted, and that they would be able to work in an environment free from harassment and intimidation. At the time Plaintiffs were hired, no collective bargaining agreement was in effect between Defendant and its unions.

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[2] Permanent replacement workers are new employees who are hired to fill vacant job positions created by striking employees. Crossover workers are existing employees who have chosen not to strike, but to "cross over" the picket lines and continue working. One of the plaintiffs, Paul Rada, is a crossover worker.

On or about May 13, 1993, Defendant and its unions settled their dispute. As part of that settlement, Defendant and its unions entered into a "Return to Work Resolution" wherein they agreed that there would be no intimidation, discrimination or harassment of employees on the basis of their participation or non-participation in the strike.

The Defendant held employee meetings wherein Dennis Hiser, AS Mid-America's Division Director, and other management personnel told the employees that there would be no intimidation, discrimination or harassment of any employees and that any such harassment would be strictly disciplined.[3] The employees were told to report any such intimidation, discrimination or harassment directly to their supervisors.

Despite Defendant's promises, both during the strike and once the strikers returned to the plant, union employees conducted a campaign of harassment and

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[3] The company distributed a letter from Dennis Hiser to all employees, dated May 13, 1993, which read, in pertinent part:

> The Return to Work Resolution also contains a commitment from both the Company and the Unions that 'there shall be no intimidation, discrimination, or harassment because of any person's participation or non-participation in the strike.' . . . Management of the Company will be closely monitoring the behavior of all employees to make sure that this provision is enforced. Any intimidation, discrimination, or harassment which does occur will be dealt with swiftly, and those individuals responsible will be subject to appropriate discipline.

intimidation against permanent replacement and cross-over workers. The company refused to take appropriate disciplinary action against the harassment under its "Rules of Conduct," which the Plaintiffs had been told would be enforced.

Inside the plant during working hours, Plaintiffs were subjected to repeated name-calling, threats against their lives, derogatory remarks, glaring stares and signs that stated "Leave or Die, Scab." Plaintiffs were struck by thrown objects and threatened with weapons such as baseball bats, metal pipes and knives. Plaintiffs frequently found ink, glue, ketchup or mustard on the steering wheels and seats of their forklifts; their lockers were vandalized; and one Plaintiff returned to his locker to find dog feces in his clothing and shoes.

Outside the plant, Plaintiffs' cars were subjected to vandalism in the company parking lot, and Plaintiffs were followed home and stalked by union employees. Union employees tried to run replacement workers off the road with their vehicles or surround replacement workers' vehicles with their cars. Plaintiffs were subjected to anonymous phone calls threatening that they would be killed, that their houses would be burned or bombed, or that their families and pets would be harmed unless they quit their employment. Some of Plaintiffs' homes, cars and personal property were set on fire, vandalized or destroyed.

As a result of the Defendant's refusal to take action, the intolerable harassment became more than the Plaintiffs could endure. Twelve of the fourteen Plaintiffs were eventually forced to end their employment; one Plaintiff

was terminated from his position for unsatisfactory work performance because he was unable to properly perform his job while being harassed; and another Plaintiff, who relocated from his pressman's job in Virginia to accept Defendant's offer of a permanent position, lost his job after only five months when he was laid off to accommodate the pressures of the unions.

Ten of the fourteen Plaintiffs filed these actions against American Signature Lincoln, now AS Mid-America, Inc., in Lancaster County District Court in January, 1994.[4] Plaintiffs subsequently amended their petitions and four new Plaintiffs filed suit. Plaintiffs' Second Amended Petitions (or Amended Petitions) seek damages for Defendant's breach of their individual employment contracts, or, in the alternative, for fraudulent misrepresentation, and intentional infliction of emotional distress.

Plaintiffs allege five separate causes of action against the Defendant, AS Mid-America, Inc. The first cause of action is a breach of contract action asserting Plaintiffs' third party beneficiary rights under an agreement entitled "Return to Work Resolution." The second cause of action is for breach of an oral contract of employment

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[4] Defendant removed the actions to the United States District Court for the District of Nebraska arguing that Plaintiffs' claims were "completely preempted" under Section 301 of the Labor Management Relations Act or the National Labor Relations Act, but the federal court remanded the cases back to state court on Plaintiffs' motion, and the U.S. Court of Appeals for the Eighth Circuit denied Defendant's petition for writ of mandamus. The district court's order on remand and subsequent Eighth Circuit order are not part of the record on appeal.

based on Defendant's promises to each of them that they were permanent employees who could work at Defendant's plant for as long as they wanted, in an environment free from any harassment or intimidation from returning strikers. The third cause of action is for breach of an implied unilateral contract based on Defendant's Rules of Conduct. Alternatively, Plaintiffs assert that Defendant misrepresented that it was hiring them as permanent replacement workers who would be able to work as long as they wanted and whom they would protect from harassment, knowing that the assertion was false and that the Plaintiffs would detrimentally rely on it. Plaintiffs' fifth cause of action is for intentional infliction of emotional distress. Plaintiffs seek damages for lost wages and benefits, future earnings and severe emotional distress.

Defendant filed a Motion for Summary Judgment on May 28, 1996, arguing that all of Plaintiffs' state law claims were preempted by the National Labor Relations Act and Section 301 of the Labor Management Relations Act. The Lancaster County District Court entered an Order on January 30, 1997, sustaining Defendant's Motion for Summary Judgment and dismissing the Plaintiffs' petitions, finding that all of the Plaintiffs' claims were preempted by the National Labor Relations Act. App. 35-41.

Plaintiffs filed a timely appeal on February 18, 1997 and subsequently filed a petition to bypass the Nebraska Court of Appeals to have their cause heard by the Supreme Court of Nebraska. The petition to bypass was granted and the appeals were heard by the Nebraska Supreme Court.

On September 25, 1998 the Nebraska Supreme Court affirmed the district court's order granting summary judgment on all but one of Plaintiffs' claims. App. 1-34. The court held that Plaintiffs' cause of action for breach of contract based on Defendant's oral promises of permanent employment in a harassment-free workplace is preempted by the National Labor Relations Act (App. 20-22); that Plaintiffs' cause of action for breach of contract based on Hiser's letter to employees is also preempted by the National Labor Relations Act (App. 30);[5] and that Plaintiffs' cause of action for third party beneficiary contract rights is preempted by Section 301 of the Labor Management Relations Act. App. 26. The court dismissed, for lack of merit under state law, Plaintiffs' cause of action for breach of an implied contract based on the Defendant's Rules of Conduct (App. 29) and Plaintiffs' cause of action for intentional infliction of emotional distress. App. 33. The court remanded Plaintiffs' cause of action for fraudulent misrepresentation to the district court for further proceedings. App. 34.

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[5] Plaintiffs' Second Amended Petition alleges breach of an employment contract based on the oral promises made to the Plaintiffs at the time of hire – that they would be able to work at Defendant's plant for as long as they wanted and that they would be free from harassment and intimidation from union workers. The petition further alleges that Defendant's promise to provide a work environment free from harassment and intimidation was embodied in a letter from Dennis Hiser to all employees. The Nebraska Supreme Court separated Plaintiffs' allegations into two distinct causes of action for purposes of its preemption analysis – breach of contract based on oral representations at the time of hiring and breach of contract based on the Hiser letter. Both were held to be preempted by the National Labor Relations Act.

The judgment of the Nebraska Supreme Court is final within the meaning of 28 U.S.C. § 1257(a) because it finally disposed of the federal preemption issues, even though one of Plaintiffs' claims has survived and is yet to be resolved through trial in state court according to state law. *See Belknap, Inc. v. Hale*, 463 U.S. 491, 497 n.5 (1983). "[S]ound judicial administration requires that [the issue of whether Plaintiffs' breach of contract claims are preempted should] be decided by this Court, if it is to be decided at all, sooner rather than later in the course of the litigation." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 506 (1975) (dissenting opinion) (quoted in *Belknap*, 463 U.S. at 497 n.5).

REASONS FOR GRANTING THE WRIT

The Nebraska Supreme Court has held that all of Plaintiffs' state law breach of contract claims are preempted under either the National Labor Relations Act, 29 U.S.C. §§ 157 & 158(a) (1998), or Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1998). The Nebraska Supreme Court's decision is contrary to United States Supreme Court precedent and policy on the preemption of replacement workers' state law claims by the National Labor Relations Act, and the issue of whether nonunion replacement workers' claims survive preemption under Section 301 of the Labor Management Relations Act is an important issue which has not yet been decided by this Court.

The Nebraska Supreme Court's decision that Plaintiffs' breach of contract claims are preempted by the

National Labor Relations Act is in direct conflict with this Court's decision in *Belknap, Inc. v. Hale,* 463 U.S. 491 (1983) and erroneously deprives these nonunion replacement workers of their rights under state law. Plaintiffs' claims are indistinguishable from the same claims held not preempted by this Court in *Belknap.*

The issue of whether nonunion replacement workers' state law breach of contract claims can be preempted by Section 301 of the Labor Management Relations Act is an important issue which has produced varied results in the lower federal courts, *see* cases cited *infra* p. 22, and should be resolved by this Court. As nonunion replacement workers, Plaintiffs should be allowed to bring their breach of contract claim for third party beneficiary rights arising out of an agreement between the Defendant and its unions in state court.

I. THE NEBRASKA SUPREME COURT'S DECISION IS CONTRARY TO THIS COURT'S POLICY ON FEDERAL LABOR LAW PREEMPTION AND DEPRIVES PLAINTIFFS OF THEIR RIGHTS UNDER STATE LAW.

Plaintiffs are all nonunion employees, hired as permanent replacement workers during a strike, who seek damages for breach of contract from their former employer.[6] In *Belknap,* 463 U.S. at 491, this Court held that an almost identical action for breach of contract and misrepresentation by strike replacement workers against

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[6] Plaintiffs' other claims have been dismissed on other grounds or remanded as explained *supra* p. 7.

their former employer was *not preempted* under federal labor law. The Court determined that such actions touch interests "so deeply rooted in local law that the courts should not assume that Congress intended to pre-empt the application of state law." *Id.* at 509.

In *Belknap*, the Supreme Court was forced to choose between extending the labor laws to regulate the rights and duties of strike replacements and employers and leaving disputes between the same to resolution under state laws. *Id.* at 518 (Blackmun, J., concurring). This Court discussed at length the dilemma faced by an employer who chooses to wield the economic weapon of hiring permanent replacement workers during a strike only to face state law claims by the strike replacements once the strikers return to the workplace. *Id.* at 491. The Court rejected the suggestion that the employer should be able to use permanent strike replacements as a powerful economic weapon during a strike, and then hide behind federal labor law to avoid the consequences of its dealings with innocent third parties.

> We find unacceptable the notion that the federal law on the one hand insists on promises of permanent employment if the employer anticipates keeping the replacements in preference to returning strikers, but on the other hand forecloses damages suits for the employer's breach of these very promises. . . .
>
> Arguments that entertaining suits by innocent third parties for breach of contract or for misrepresentation will "burden" the employer's right to hire permanent replacements are no more than arguments that "this is war," that

> "anything goes," and that promises of permanent employment that under federal law the employer is free to keep, if it so chooses, are essentially meaningless. *It is one thing to hold that the federal law intended to leave the employer and the union free to use their economic weapons against one another, but is quite another to hold that either the employer or the union is also free to injure innocent third parties without regard to the normal rules of law governing those relationships.*

Id. at 500 (emphasis added).[7]

This Court has consistently cautioned against a broad and inflexible application of the labor preemption doctrine in such cases:

> [T]he history of the labor pre-emption doctrine in this Court does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected. . . .

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[7] Commentators have opined that the threat of potential lawsuits by strike replacements is intended to serve as an important check upon an employer's power to hire permanent replacement workers during a strike, and helps to maintain the balance of power between labor and management. *See* II The Developing Labor Law 1675 (Patrick Hardin ed., 3d ed. 1992). *See also Belknap*, 463 U.S. at 521 (Blackmun, J., concurring) ("[T]he hesitation engendered by potential contract damages and damages for misrepresentation is as consistent with federal law as it is with common sense and decency."). The precedent set by the Nebraska Supreme Court in this case would allow an employer's power to hire permanent replacement workers to go unchecked by the threat of potential contract damages.

> 'Our cases indicate . . . that inflexible application of the doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme.'

Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 188 (1978) (footnote omitted) (quoting *Farmer v. Carpenters*, 430 U.S. 290, 302 (1977)).

Plaintiffs are innocent third parties merely seeking redress from the Defendant's wrongdoing. The Nebraska Supreme Court has over-extended the labor preemption doctrine to apply to this case in direct contravention of Supreme Court precedent and stated policy. This Court must grant certiorari to reverse the decision of the Nebraska Supreme Court and restore to Plaintiffs their state common law claims in accord with this Court's holding in *Belknap*.

A. THE NEBRASKA SUPREME COURT'S DECISION THAT PLAINTIFFS' CLAIMS ARE PREEMPTED UNDER THE NLRA IS IN DIRECT CONFLICT WITH THIS COURT'S HOLDING IN *BELKNAP v. HALE*.

In *Belknap*, 463 U.S. at 491, a case directly on point with this factual situation, this Court analyzed the issue of whether the NLRA preempts replacement workers' claims of breach of contract and misrepresentation against their former employer. The Court held that a claim is *not preempted, even if it concerns conduct actually prohibited by the NLRA*, if the regulated activity is 1) merely of peripheral concern to the federal labor laws or

2) touches interests deeply rooted in local feeling and responsibility. *Id.* at 498.

In direct disregard of this Court's decision in *Belknap*, the Nebraska Supreme Court held that Plaintiffs' claims are preempted because their employer's failure to fulfill its promises of permanent employment and protection from harassment are actually or arguably prohibited by the NLRA, and as such, the same controversy could have been presented to the NLRB. App. 21-22. The court all but ignored this Court's holding in *Belknap*, that such claims are only *presumptively* preempted, and that replacement workers' breach of contract claims which touch state and local interests should *not* be preempted but resolved by state law.[8] 463 U.S. at 509.

The Nebraska Supreme Court examined the facts of *Belknap* in detail, but based its decision on two National Labor Relations Board cases – *Newport News Shipbuilding & Dry Dock Co.*, 236 N.L.R.B. 1499 (1978) and *Brewton Fashions, Inc., a Division of Judy Bond*, 145 N.L.R.B. 99 (1963), *enf'd*, 361 F.2d 8 (5th Cir.), *cert. denied*, 385 U.S. 842 (1966). Since the NLRB dealt with issues involving an

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[8] Other state and federal courts which have analyzed similar issues under *Belknap* have uniformly held that an employee's state law cause of action for breach of an individual employment contract is *not* preempted by the NLRA. *See, e.g., Branson v. Greyhound Lines, Inc.*, 126 F.2d 747 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1362 (1998) (replacement employee); *White v. National Steel Corp.*, 938 F.2d 474 (4th Cir. 1991) (former union members); *Kelecheva v. Multivision Cable T. V. Corp.*, 22 Cal. Rptr. 2d 453 (Cal. Ct. App. 1993) (supervisor); *Campbell v. Lockheed Shipbuilding & Constr.*, 785 P.2d 459 (Wash. Ct. App. 1990) (apprentices).

employer's acquiescence in union harassment in those two cases, the court reasoned, Plaintiffs' claims in this case involve conduct "so inextricably intertwined with federal labor law that to do other than preempt appellants' alleged breach of contract claims would obfuscate the NLRB's ability to adjudicate controversies committed to the NLRB by the NLRA." App. 21. Further,

> [t]he conduct attributed by the appellants to AS Mid-America – the failure to protect its employees from harassment – would be, if proved, both a breach of the putative oral contract and a violation of federal labor law. Therefore, the focus of the state law breach of contract action and NLRB determinations would be the same – whether AS Mid-America acted or failed to act such that its replacement workers were subjected to harassment. We find that appellants' alleged oral contract claims are preempted by the NLRA.

App. 22.[9]

The NLRB decisions relied on by the Nebraska Supreme Court have no precedential value in this case. Not only do they pre-date this Court's decision in *Belknap*, they contain no discussion of the preemption of state law claims under the NLRA. *Newport News* and *Brewton Fashions* involved controversies between competing unions and their employer. *Newport News*, 236 N.L.R.B. at 1499; *Brewton Fashions*, 145 N.L.R.B. at 99. Unlike this case, no nonunion employees were involved

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[9] Later, the court referred back to the same erroneous analysis in summarily dismissing, as preempted by the NLRA, Plaintiffs' claim based on the Hiser letter. App. 30.

and no employee sought to file a state law claim against the employer. *Id.*

Even before *Belknap*, this Court recognized that the preemption analysis used by the Nebraska Supreme Court, the same analysis used by this Court in *Iron Workers v. Perko*, 373 U.S. 701 (1963), is out-dated in light of its more recent decisions. In *Local 926, Int'l Union of Operating Engineers v. Jones*, 460 U.S. 669 (1983) Justice Rehnquist observed that this Court's earlier decision in *Perko* involved a similar factual situation to that in *Jones*, but that *Perko's* preemption analysis, the same analysis used by the Nebraska Supreme Court in this case, is no longer dispositive:

> In *Perko*, the mere fact that a state claim was based upon arguably prohibited conduct dictated the conclusion that the state claim was preempted. *Id.* at 708, 83 S.Ct. at 1433 ("it is enough to hold as we do, that it is plain on a number of scores that the subject matter of this lawsuit 'arguably' comes within the Board's jurisdiction to deal with unfair labor practices"). This type of rigid interpretation of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), does not survive our more recent decisions in *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978); *Farmer v. Carpenters*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977); *Linn v. Plant Guard Workers*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). As one commentator has remarked, "the Garmon test can now be described only by reference to its exceptions." [Citation omitted.]

Jones, 460 U.S. at 685 n.2 (Rehnquist, J., dissenting). The Nebraska Supreme Court's decision to preempt Plaintiffs' claims contravenes not only *Belknap*, but the entire line of Supreme Court cases, such as *Sears*, *Farmer* and *Linn*, which comprise the overwhelming exceptions to the Garmon preemption rule.[10]

1. Plaintiffs' Claims Are Indistinguishable From Claims Held Not Preempted In *Belknap*.

The Supreme Court has developed two preemption doctrines in the context of the National Labor Relations Act. The first, *Garmon* preemption, established in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), forbids state and local regulation of activities that the NLRA protects or prohibits or arguably protects or

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[10] This Court has consistently upheld state court jurisdiction over conduct that "touches interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Garmon*, 359 U.S. at 244. *See Belknap*, 463 U.S. at 512 (breach of contract and misrepresentation); *Sears*, 436 U.S. at 180 (trespass); *Farmer*, 430 U.S. at 290 (intentional infliction of emotional distress); *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966) (libel); *Automobile Workers v. Russell*, 356 U.S. 634 (1958) (violence); *Youngdahl v. Rainfair*, 355 U.S. 131 (1957) (violence); *Construction Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954) (threats of violence). *See also Franchise Tax Board v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 25 n.28 (1983) (suggesting battery action arising from violent strike would not be preempted).

prohibits. *Building & Trades Council v. Associated Builders & Contractors of Mass./Rhode Island*, 507 U.S. 218, 220 (1993). The second, *Machinists* preemption, established in *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), prohibits state and municipal regulations of areas that Congress left to the free play of economic forces. *Building & Trades Council*, 507 U.S. at 221.

In *Belknap*, 463 U.S. at 495-96, an employer hired permanent replacement workers during a strike and assured them that they would not be fired to accommodate returning strikers. Later, the striking union brought unfair labor practice charges and the employer filed counter-charges with the NLRB. *Id.* As part of a settlement of all charges, the employer agreed to reinstate returning strikers and lay off the replacements. *Id.* at 496. When the replacement workers sued the employer in state court for misrepresentation and breach of contract, the employer argued that the claims were preempted by the NLRA. *Id.* at 496-97.

This Court found that the replacement workers' action was not preempted by *Machinists* because such suits do not interfere with the asserted policy of federal law favoring settlement of labor disputes. *Id.* at 499-507. The Court further found that the action was not preempted by *Garmon* because the state court claims concerned the rights of replacement workers under state law, not the rights of strikers under federal law, which would be the focus of any NLRB proceeding. *Id.* at 510-511.

This Court held that even though the employer's offer of permanent employment to the replacements arguably would have been an unfair labor practice, their

actions for fraud and breach of contract were not preempted. *Id.* at 510. The controversy between the employer and the replacements could not be said to be identical to that between the employer and the strikers. *Id.* The focus of the Board in determining whether the employer had committed unfair labor practices as charged by the union "would be on whether the rights of strikers were being infringed. . . . The Board would be concerned with the impact on strikers not with whether the employer deceived replacements." *Id.* On the other hand, in the state court action, the focus would be on the rights of the replacements. *Id.*

In addition, the state courts could not offer the strikers the relief, such as reinstatement, that the Board could provide, nor could the Board have awarded the relief of monetary damages that the replacements sought. *Id.* at 510-11. The Court therefore found that the Board's treatment of the strikers' claims for back wages and restoration of benefits would not be affected by any relief in damages that the replacements might obtain in their state court action. *Id.* at 511.

The Court concluded that the suit touched interests deeply rooted in local law in that the state had a "substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm" and in "providing a remedy to its citizens for breach of contract." *Id.* at 511-12.

The factual situation in this case is strikingly similar to that in *Belknap*. Plaintiffs are nonunion replacement workers, hired during a strike, and promised permanent

employment in an effort to continue the employer's operations during the strike. *Id.* at 495-96. Plaintiffs now seek redress for their former employer's failure to keep its promises through breach of contract claims. As in *Belknap*, although the subject matter of the underlying controversy could arguably be presented to the NLRB, the focus of any NLRB proceeding would be on whether the rights of the striking union employees were being infringed, not on whether the employer deceived or breached a contract with the replacement workers. *See id.* at 510. In addition, the Plaintiffs do not seek reinstatement to their former positions, but monetary damages which the Board cannot provide.[11] *See id.* at 510-11.

In *Belknap*, this Court could have held that the strike replacement workers' breach of contract and misrepresentation claims were nothing more than claims that their employer discriminated against them because of their nonunion status in violation of the NLRA when they laid them off in order to settle an unfair labor practice charge. *Id.* at 496. Instead, the Court allowed the replacement workers' claims to go forward without regard to whether they *could* have stated their claims under the NLRA. *Id.* at 510.

Similarly, in *Farmer* and *Sears*, the Court allowed state claims for intentional infliction of emotional distress and trespass to go forward, deciding that state courts may

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[11] The Nebraska Supreme Court acknowledged such distinctions in discussing Plaintiffs' misrepresentation claim, which it found not preempted, but failed to reach the same level of analysis in preempting Plaintiffs' breach of contract claims. *See* App. 31-32.

distinguish the abusive *manner* of discrimination from the discrimination itself in *Farmer*, 430 U.S. 290, and in *Sears*, the pure trespass aspects of picketing from the objectives of the same picketing. 436 U.S. at 197. The Court held in *Sears* that such claims "create no realistic risk of interference with the Labor Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practices." 436 U.S. at 198.

There is no risk of interference with the NLRB's jurisdiction in this case. Like the replacement workers in *Belknap*, the Plaintiffs in this case need not prove that the harassment they were forced to endure was a result of discrimination against them because of their nonunion status. In this case, the replacement workers' actions for monetary damages against their former employer concern only whether the Defendant failed to curtail the harassment and provide Plaintiffs with permanent employment for as long as they wanted, not whether the objectives of the employer, or even the unions, violated federal law.

In finding that the Plaintiffs' claims are preempted because the controversy could have been presented to the NLRB, the Nebraska Supreme Court simply failed to complete the analysis set forth in *Belknap*:

> [S]tate . . . causes of action are presumptively preempted if they concern conduct that is actually or arguably either prohibited or protected by the Act. The state . . . cause of action may, however, be sustained if the behavior to be regulated is behavior that is of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility.

463 U.S. at 498 (citations omitted). In other words, even conduct actually prohibited by the NLRA is only *presumptively* preempted. *Id.* State law claims concerning such conduct should *not* be preempted if they concern behavior of only peripheral concern to the federal law or touch interests deeply rooted in local feeling and responsibility. *Id.*

Plaintiffs seek damages for Defendant's breach of its promises to provide a permanent job free from harassment and intimidation. This Court has already held that such state law actions are deeply rooted in local feeling and responsibility, will not frustrate any policy of the federal labor laws, and should be resolved under state law. *See Belknap*, 463 U.S. at 498. Thus, this Court must grant certiorari to reverse the Nebraska Supreme Court's decision and allow Plaintiffs' breach of contract claims to be resolved under state law.

B. IN THIS CASE OF FIRST IMPRESSION, THE COURT MUST DECIDE WHETHER NONUNION REPLACEMENT WORKERS' STATE LAW CLAIMS SURVIVE PREEMPTION UNDER SECTION 301 OF THE LMRA.

Whether replacement workers' state law breach of contract claims survive preemption under Section 301 of the Labor Management Relations Act is an issue which has not yet been decided by this Court. Although *Belknap* mandates that replacement workers' breach of contract claims cannot be preempted under the National Labor Relations Act, it does not address the issue of whether those claims may be preempted under Section 301 of the

LMRA. Federal courts addressing the issue have differed in their conclusions concerning whether a nonunion replacement workers' state law claims can be preempted under Section 301. *See, e.g., Branson v. Greyhound Lines, Inc.*, 126 F.2d 747 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1362 (1998) (replacement employee's breach of contract action held not preempted under § 301); *Baldwin v. Pirelli Armstrong Tire Corp.*, 927 F. Supp. 1046 (M.D. Tenn. 1996) (replacement employees' civil conspiracy claim, based on agreement between employer and union to fire replacement workers, "completely preempted" under § 301 for removal purposes).

Section 301 of the LMRA preempts state causes of action that allege the violation of a collective bargaining agreement. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210 (1985). In *Livadas v. Bradshaw*, 512 U.S. 107 (1994), this Court reiterated that the purpose of Section 301 is to promote collective bargaining between union and management and to enforce the parties' intent to arbitrate disputes over such agreements. *Id.* at 122-123.

In this case, the Nebraska Supreme Court held that Plaintiffs' first cause of action for third party beneficiary rights arising out of an agreement between their employer and its unions that "there shall be no intimidation, discrimination or harassment,"[12] is preempted under Section 301 of the LMRA. App. 26. The Nebraska Supreme Court failed to discuss or even mention the fact that Plaintiffs are all nonunion strike replacement

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[12] *See supra* note 3.

workers, and were never parties to any collective bargaining agreement between Defendant and its unions.[13]

Relying on this Court's decision in *Retail Clerks Internat'l Ass'n v. Lion Dry Goods*, 369 U.S. 17 (1962), the Nebraska Supreme Court found that the agreement, entitled "Return to Work Resolution," was a strike settlement agreement that falls within the purview of § 301. "As such, any reliance by appellants upon the return to work resolution, directly or via third-party beneficiary rights, is preempted by federal labor law. We therefore find that appellants' claims based on the return to work resolution are preempted by § 301 of the LMRA. . . . " App. 26. The court later reasoned that since the promises made in the Hiser letter consisted of the same language contained in the Return to Work Resolution, Plaintiffs' breach of contract claim based on the Hiser letter is also preempted.[14]

In *Lion Dry Goods* this Court extended Section 301 preemption to include claims founded directly on rights arising out of a strike settlement agreement in addition to claims alleging the violation of a collective bargaining agreement. 369 U.S. at 17. In *Lion Dry Goods*, however, the strike settlement agreement resembled a traditional collective bargaining agreement, and the action was brought

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[13] The court did find, however, that rather than file grievances under the Return to Work Resolution, "[t]he employees were told to report any such intimidation, discrimination, or harassment directly to their supervisors." App. 9-10.

[14] Although the court concluded that the claim was preempted by the NLRA, the analysis indicates it relied on 301 preemption as well. *See* App. 30. See note 3, for the pertinent text of the Hiser letter.

by two unions, on the sole jurisdictional basis of Section 301, seeking to compel two department stores to comply with arbitration awards. *Id.* at 19. None of the policies underlying the Supreme Court's decision in *Lion Dry Goods* would be furthered by preempting Plaintiffs' third party beneficiary claims under Section 301 in this case.

Most importantly, Plaintiffs are not members of the union nor parties to the contract. *Lion Dry Goods* articulates "the policy that federal courts should use their authority under § 301 to resolve contract disputes *between employers and unions* that are significant to the maintenance of labor peace." *Copps Food Center, Inc. v. Local No. 73A*, 733 F. Supp. 304, 307 (W.D. Wis. 1990) (emphasis added). *See Lion Dry Goods*, 369 U.S. at 28 (federal courts should enforce such agreements "on behalf of or against labor organizations"). This is not a contract dispute between an employer and a union. Preempting Plaintiffs' claims against their former employer will not promote stable labor relations between Defendant and its unions, nor will it prevent the disruption of interstate commerce. *See Lion Dry Goods*, 369 U.S. at 27.

Preemption of Plaintiffs' claims under Section 301 of the LMRA will not promote the collective bargaining process. By the very nature of their employment as permanent strike replacements, the terms and conditions of Plaintiffs' employment are not subjects covered in a collective bargaining agreement.[15] As such, Plaintiffs' claims

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[15] *See Service Elec. Co.*, 281 N.L.R.B. 633, 641 (1986) (an employer has no duty to negotiate with the union regarding the terms and conditions of replacements' employment); *Leveld Wholesale, Inc.*, 218 N.L.R.B. 1344, 1350 (1975) (union's duty of

concerning the terms and conditions of their employment should not be preempted by Section 301.

Further, the policy of preserving the effectiveness of arbitration will not be promoted by the preemption of Plaintiffs' claims. In *Livadas*, this Court stated that its prior decisions giving Section 301 preemptive effect have been "in large part to assure that agreements to arbitrate grievances would be enforced, regardless of the vagaries of state law and lingering hostility toward extrajudicial dispute resolution." 512 U.S. at 122. *See also Allis-Chalmers*, 471 U.S. at 219-20 (central policy behind preemption under 301 is to preserve the effectiveness of arbitration). The Court recognized that Section 301's preemption of state law rights is limited because the scope of the arbitral promise is limited. 512 U.S. at 123 n. 17 (citing *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit")). As strike replacements, Plaintiffs were clearly not parties to the collective bargaining agreement and their claim not arbitrable. *See supra* notes 13 & 15. As such, their state law claim should be resolved under state law.

The Sixth Circuit, in a well-reasoned opinion relying on Supreme Court precedent, has held that the widow of a deceased union employee suing for benefits under a collective bargaining agreement, has the option of suing

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fair representation does not prevent it from insisting during negotiations that an employer terminate replacements to make room for returning strikers).

at common law as a third party beneficiary under established contract principles or pursuing a fec ral remedy for breach of contract under Section 301 of the LMRA. *Hazen v. Western Union Telegraph Co.*, 518 F.2d 766, 769-70 (6th Cir. 1975) (citing *Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157 (1971) (retired employee may either sue at common law under contract principles or pursue federal remedy under § 301)). *See also Justice v. Union Carbide Corp.*, 405 F. Supp. 920, 922 (E.D. Tenn. 1975), *aff'd*, 551 F.2d 1078 (6th Cir. 1976) (former employee had option of suing under common law for disability pension benefits). In *Hazen*, the court reasoned that the goal of the labor statutes, to further industrial peace through employee organization and collective bargaining, does not apply to a nonunion plaintiff seeking to enforce third party beneficiary rights. 518 F.2d at 769. As nonunion strike replacement workers, Plaintiffs should have the right to bring a state law breach of contract action to enforce third party beneficiary rights without regard to the federal labor statutes. *See also Belknap*, 463 U.S. at 500.

In emphasizing the limited scope of Section 301's preemptive effect, this Court in *Livadas* stated:

> In *Lueck* and in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 109 S.Ct. 1877, 100 L.Ed.2d 410 (1988), we underscored the point that *§ 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law*, and we stressed that it is the legal character of a claim, as "independent" of rights under the collective-bargaining agreement, *Lueck, supra*, 471 U.S., at 213, 105 S.Ct., at 1912 (and not whether a grievance arising from

> "precisely the same set of facts" could be pursued, *Lingle, supra,* 486 U.S., at 410, 108 S.Ct., at 1883) that decides whether a state cause of action may go forward. Finally, we were clear that when the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished, *see Lingle,* 486 U.S., at 413, n. 12, 108 S.Ct., at 1885, n. 12 . . . .

512 U.S. at 123-124 (footnotes omitted) (emphasis added).

Plaintiffs' petitions allege that Defendant breached their third party beneficiary rights arising from the Return to Work Resolution when it failed to provide them with a work environment free from intimidation, discrimination or harassment. That same promise was also made to Plaintiffs at the time they were hired, at employee meetings, and in a letter to all employees from Dennis Hiser. Plaintiffs' third party beneficiary claim should not be preempted merely because the right Plaintiffs seek to enforce is included in a strike settlement agreement between Defendant and its unions.

Belknap establishes that Plaintiffs' strike replacement worker claims for breach of contract are of only "peripheral concern" to federal labor law and that permitting these actions will not "frustrate any policy of the federal labor laws." *Belknap,* 463 U.S. at 509-12. Plaintiffs are all *nonunion* strike replacement workers who were never parties to the collective bargaining agreement between Defendant and its unions. As this Court has stated, "the plaintiff is the master of the complaint," and "may, by

eschewing claims based on federal law, choose to have the cause heard in state court." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1987).

This Court should grant certiorari to decide for the first time that replacement workers' state law claims survive preemption under Section 301. The Nebraska Supreme Court's decision preempting Plaintiffs' breach of contract claim for third party beneficiary rights should be reversed, and Plaintiffs' claim resolved under state law.

CONCLUSION

For the foregoing reasons, Petitioners request that this Court grant certiorari to reverse the Nebraska Supreme Court's erroneous preemption of Plaintiffs' breach of contract claims under the National Labor Relations Act and Section 301 of the Labor Management Relations Act, and to thereby restore Plaintiffs' state law claims in accord with *Belknap* and resolve an issue of first impression in this Court – whether nonunion replacement workers' state law claims survive preemption under Section 301.

Respectfully submitted,

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APPENDIX A

NEBRASKA SUPREME COURT

EARL FOREMAN ET AL., APPELLANTS, V.
AS MID-AMERICA, INC., APPELLEE.
255 Neb. 323, ___ N.W.2d ___

Filed September 25, 1998.
Nos. S-97-209 through S-97-222.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

2. ___. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.

3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

4. ___: ___. In an appellate review, the grant of a motion for summary judgment may be affirmed on any ground available to the trial court, even if it is not the same reasoning the trial court relied upon.

5. **Summary Judgment: Jurisdiction.** A summary judgment motion based on jurisdictional grounds is treated as and serves the same purpose as a demurrer on jurisdictional grounds.

6. **Summary Judgment: Jurisdiction: Pleadings.** A summary judgment motion based on a jurisdictional

defect is treated the same as a demurrer based on a jurisdictional defect for purposes applying the rule regarding repleading.

7. ___: ___: ___. After a summary judgment motion on jurisdictional grounds has been granted, but where a reasonable possibility exists that the jurisdictional defect may be cured by amendment and a cause of action may be stated, denying the plaintiff the opportunity to replead is an abuse of discretion.

8. **Labor and Labor Relations: Federal Acts: Actions: Presumptions.** State causes of action are presumptively preempted if they concern conduct that is actually or arguably either prohibited or protected by the National Labor Relations Act.

9. **Labor and Labor Relations: Federal Acts: Actions.** A state cause of action may be sustained if the behavior sought to be regulated is of only peripheral concern to federal labor law or touches interests deeply rooted in local feeling and responsibility.

10. **Labor and Labor Relations: Federal Acts.** For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the National Labor Relations Act prohibits.

11. **Labor and Labor Relations: Employment Contracts.** Employee handbooks, rules, and oral representations can be the bases for a contractual obligation with or without the existence of a collective bargaining agreement.

12. **Fraud: Proof.** To recover in an action for fraud based on misrepresentation of a material fact, a plaintiff must prove that (1) the defendant represented a material fact; (2) the represented fact was untrue; (3) the defendant knew that the represented fact was

untrue, recklessly made the representation as a positive assertion without knowledge concerning the truth of the representation, or made the representation negligently as the result of a lack of reasonable care in ascertaining the fact represented or in the absence of skill and competence required by a particular business or profession; (4) the misrepresentation was made with the intention that the plaintiff would rely on it; (5) the plaintiff reasonably relied on the misrepresentation; and (6) as the result of such reliance, the plaintiff was damaged.

13. **Mental Distress: Proof.** To recover for intentional infliction of emotional distress, the plaintiff must show that (1) there has been intentional or reckless conduct, (2) the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) the conduct caused emotional distress so severe that no reasonable person should be expected to endure it.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, JUDGE. REVERSED AND REMANDED.

ALAN L. PLESSMAN AND SUSAN I. STRONG, OF PLESSMAN LAW OFFICES, FOR APPELLANTS.

JOSEPH S. TURNER OF SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, AND DOUGLAS J. PETERSON, OF KNUDSEN, BERKHEIMER, RICHARDSON & ENDACOTT, FOR APPELLEE.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, and MCCORMACK, JJ., and HASTINGS, C.J., Retired.

PER CURIAM.

This case involves a consolidated lawsuit brought by 14 former AS Mid-America, Inc., employees as a result of a labor strike that occurred at the AS Mid-America printing plant located in Lincoln, Nebraska. The question presented is whether these 14 nonunion employees' various breach of contract claims, fraudulent misrepresentation claims, and intentional infliction of emotional distress claims are preempted by either § 301 of the Labor Management Relations Act (LMRA), codified at 29 U.S.C. § 171 et seq. (1994), or the National Labor Relations Act (NLRA), 29 U.S.C. § 157 et seq. (1994).

On January 18, 1994, 10 of the 14 appellants filed suit against AS Mid-America in the Lancaster County District Court. Appellants subsequently amended their petitions on December 11, 1995, adding four additional appellants. The 14 appellants are Dene Dixon, Larry Masters, Michael Riggs, Brian Faust, Ralph Chloupek, Jeffery Reedy, Michael Werger, Raymond Thomason, Kenneth Chloupek, Paul Rada, Jerry Study, Kent Watson, Jr., Earl Foreman, and Lynn Dowding. Appellants' second amended petitions sought damages against AS Mid-America for the company's alleged breach of a third-party beneficiary contract, breach of an oral contract, breach of an implied unilateral contract, fraudulent misrepresentation, and intentional infliction of emotional distress.

On January 9, 1996, AS Mid-America denied the allegations therein, contending that appellants' claims were preempted by the NLRA, preempted by § 301 of the LMRA, barred by the applicable statute of limitations, barred for failure to exhaust administrative remedies, and improperly joined. On May 28, AS Mid-America filed a

motion for summary judgment based on these same allegations, generally claiming that there was no genuine issue as to any material fact. On January 30, 1997, the district court granted AS Mid-America's motion for summary judgment, finding that appellants' claims were preempted by the NLRA. Appellants filed an appeal in the Nebraska Court of Appeals on February 18, and we removed the case to our docket pursuant to our power to regulate the caseloads of the Court of Appeals and this court. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

Appellants' sole assignment of error is that the Lancaster County District Court erred in sustaining AS Mid-America's motion for summary judgment, finding appellants' causes of action preempted by the NLRA.

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Houghton v. Big Red Keno*, 254 Neb. 81, 574 N.W.2d 494 (1998); *Barnett v. Peters*, 254 Neb. 74, 574 N.W.2d 487 (1998). On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998); *Gans v. Parkview Plaza Partnership*, 253 Neb. 373, 571 N.W.2d 261 (1997). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Barnett v. Peters, supra; Chalupa v. Chalupa*, 254

Neb. 59, 574 N.W.2d 509 (1998). In an appellate review, the grant of a motion for summary judgment may be affirmed on any ground available to the trial court, even if it is not the same reasoning the trial court relied upon. *Logan Ranch v. Farm Credit Bank*, 238 Neb. 814, 472 N.W.2d 704 (1991). See, also, *Gustin v. Scheele*, 250 Neb. 269, 549 N.W.2d 135 (1996); *Crystal Clear Optical v. Silver*, 247 Neb. 981, 531 N.W.2d 535 (1995); *Wymore v. Wymore*, 239 Neb. 940, 479 N.W.2d 778 (1992).

A summary judgment motion based on jurisdictional grounds is treated as and serves the same purpose as a demurrer on jurisdictional grounds. *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654 (1993); *Kerndt v. Ronan*, 236 Neb. 26, 458 N.W.2d 466 (1990); *Nelson v. Sioux City Boat Club*, 216 Neb. 484, 344 N.W.2d 634 (1984). A summary judgment motion based on a jurisdictional defect is treated the same as a demurrer based on a jurisdictional defect for purposes applying the rule regarding repleading. *Concerned Citizens v. Department of Environ. Contr., supra*. Consequently, after a summary judgment motion on jurisdictional grounds has been granted, but where a reasonable possibility exists that the jurisdictional defect may be cured by amendment and a cause of action may be stated, denying the plaintiff the opportunity to replead is an abuse of discretion. *Id.*

Resolving every controverted fact in favor of appellants and affording them the benefit of every reasonable inference deducible from the evidence, the following is disclosed: This suit arose out of a labor strike that occurred on April 27, 1993, at AS Mid-America's commercial printing plant located in Lincoln, Nebraska. Before the strike, the Lincoln plant was unionized and operated

under a collective bargaining agreement (CBA) between AS Mid-America and the Graphic Communications International Union, Local Nos. 520 and 221, and the International Association of Machinists Union, Local No. 31. In March 1993, the CBA was to be renewed and negotiations were underway. However, when negotiations broke down and new collective bargaining terms failed to be established, the CBA expired and a strike ensued. On April 27, the 690 unionized employees went on strike. As a consequence, no CBA was in effect at the AS Mid-America plant as of April 27.

To continue operations, AS Mid-America needed workers to fill the vacancies created by the strike. AS Mid-America decided to hire permanent replacement workers and to urge regular, prestrike (crossover) employees to cross picket lines and continue working. Many people, including appellants, applied to fill the vacant job positions created by the ensuing strike. To encourage people to accept these positions and continue working after the strike, AS Mid-America orally promised each individual applicant that they would have a permanent job, that they could work at AS Mid-America for as long as they wanted, and that they would be able to work in an environment free from harassment and intimidation if and when the strikers returned.

AS Mid-America eventually hired approximately 46 permanent replacement workers, and approximately 83 employees abandoned the strike and returned to work as crossover employees. Appellants include 13 permanent replacement workers and 1 crossover worker.

Upon hiring, each new employee was given a copy of AS Mid-America's "Rules of Conduct" and was asked to sign an "Employee Acknowledgment Receipt" form. The form stated that the employee had read, understood, and agreed to abide by the rules of conduct. The rules of conduct addressed three levels of employee misconduct and the respective consequences. The rules specifically discussed intolerable violations, warranting immediate suspension awaiting discharge; major violations, warranting suspension; and minor violations, warranting a written warning on the first violation, suspension on the second violation, and suspension awaiting discharge on the third violation.

On May 13, 1993, AS Mid-America and the unions settled the dispute and ended the strike. As part of the settlement, the unions signed a strike settlement agreement entitled "Return to Work Resolution" and began the process of ratifying new CBAs. The return to work resolution effectively terminated the strike and provided mechanisms designed to "return Company operations to normal." The return to work resolution contained a promise from AS Mid-America and the unions, essentially summarizing the prior oral promises made to each individual employee that he or she could stay at AS Mid-America as long as he or she wanted and that the company would protect them from discrimination and harassment. The provision in the return to work resolution specifically stated that "[t]here shall be no intimidation, discrimination, or harassment because of any person's participation or non-participation in the strike."

A new CBA was signed on September 20, 1993, and became retroactively effective on May 13, 1993.

The strikers returned to work on May 14, 1993. As the employees entered the AS Mid-America plant, the company distributed a letter to all employees, signed by Dennis Hiser, AS Mid-America's division director, summarizing the prior oral promises made to the permanent replacement and crossover workers. The letter reiterated the oral promises, couching the promises in terms of the return to work resolution. The letter provided, in pertinent part:

> The Return to Work Resolution also contains a commitment from both the Company and the Unions that "there shall be no intimidation, discrimination, or harassment because of any person's participation or non-participation in the strike." . . . Management of the Company will be closely monitoring the behavior of all employees to make sure that this provision is enforced. Any intimidation, discrimination, or harassment which does occur will be dealt with swiftly, and those individuals responsible will be subject to appropriate discipline.

That same day, AS Mid-America also held various employee meetings throughout the plant. At these meetings, the company's division director and other management officials again summarized the oral promises that were previously made to the permanent replacement and crossover workers during the initial hiring stage (now also contained in the return to work resolution) and specifically told all employees that there would be no intimidation, discrimination, or harassment of any employees and that those guilty of such harassment would be strictly disciplined. The employees were told to

report any such intimidation, discrimination, or harassment directly to their supervisors.

Despite AS Mid-America's initial oral promises to the permanent replacement and crossover workers, the inclusion of the oral promises in the return to work resolution, and the Hiser letter, union employees conducted a campaign of harassment and intimidation against the permanent replacement and crossover workers. The discrimination and intimidation included various forms of verbal, physical, and psychological harassment inside the plant during working hours and also outside the plant after working hours. The harassment included, but was not limited to, nonunion members' being followed home after work by union members, name calling, physical threats, union members' placing threatening telephone calls to the homes of nonunion members, various forms of property damage, and in one extreme situation, a nonunion employee's having dog feces spread on the clothes in his locker.

The harassment and intimidation became so intense that several appellants attempted to speak with union officials to seek union membership. These appellants thought that becoming members of the union might alleviate some of the harassment. Such attempts were useless. Union officials either refused to talk to the employee or told the inquiring employee that union membership was out of the question.

As a result of the harassment, 12 of the 14 appellants quit their jobs and allege they were constructively discharged. Of the two other employees, one was discharged for alleged unsatisfactory work performance and the

other was laid off allegedly because of downsizing in the work force.

Based on these events, appellants filed suit against AS Mid-America and alleged five separate causes of action. First, appellants claim AS Mid-America breached the terms of the return to work resolution. Appellants claim damages under this contract via third-party beneficiary law. Second, appellants claim AS Mid-America breached the terms of the rules of conduct. Third, appellants claim AS Mid-America breached a unilateral contract which was formed when AS Mid-America distributed the Hiser letter to all employees. Fourth, appellants claim AS Mid-America committed fraudulent misrepresentation when the company, intending to deceive prospective employees, made specific promises regarding job security and permanency that the company knew to be false. Fifth, appellants contend AS Mid-America caused intentional infliction of emotional distress by either permitting or passively condoning the union employees' verbal, physical, and psychological harassment, intimidation, and discrimination of the permanent replacement and cross-over workers. The second amended petition also discloses that appellants seem to rely on the oral contract formed during the initial hiring stage, when company representatives promised each individual employee that the job was permanent and that no discrimination or harassment would occur if the strikers returned.

We will initially address the viability of the oral contract allegedly formed during the initial hiring stages. This cause of action appears on the face of the second amended petition but is not specifically relied upon as a

distinct cause of action. The law is clear that a summary judgment motion based on a jurisdictional defect is treated the same as a demurrer based on a jurisdictional defect for purposes of applying the rule regarding repleading. *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654 (1993). Consequently, after a summary judgment motion on jurisdictional grounds has been granted, but where there is a reasonable possibility that the jurisdictional defect may be cured by amendment and a cause of action may be stated, denying the plaintiff the opportunity to replead is an abuse of discretion. *Id.* As AS Mid-America's motion for summary judgment was granted on jurisdictional grounds, we must first determine whether appellants could replead their second amended petitions and specifically state a cause of action for breach of the oral contract formed during the initial hiring stages.

Before addressing the merits of the alleged oral contract claim, we must initially determine whether appellants' cause of action based on the oral contract could be preempted under the NLRA. Under the NLRA, there are two doctrines for determining whether state regulations or causes of action are preempted. The first, articulated in *San Diego Unions* [sic] *v. Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959), provides that state causes of action are presumptively preempted if they concern conduct that is actually or arguably either prohibited or protected by the NLRA. In *Garmon*, the Supreme Court stated that a state cause of action may, however, be sustained if the behavior sought to be regulated is of only peripheral concern to federal labor law or touches interests deeply rooted in local feeling and responsibility. See,

e.g., *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 98 S. Ct. 1745, 56 L. Ed. 2d 209 (1978); *Farmer v. Carpenters*, 430 U.S. 290, 97 S. Ct. 1056, 51 L. Ed. 2d 338 (1977); *Linn v. Plant Guard Workers*, 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966). The Court in *Garmon* stated that in such cases, the state's interest in controlling or remedying the effects of the conduct is balanced against both the interference with the NLRA's ability to adjudicate controversies committed to the National Labor Relations Board (NLRB) by the NLRA and the risk that the state will sanction the conduct that the NLRA protects.

The second preemption doctrine, set forth in *Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976), proscribes state regulations and state law causes of action which concern conduct that Congress intended to be unregulated and that was to remain a part of the self-help remedies left to the combatants in labor disputes. In *Machinists*, the Court stated that the crucial inquiry is whether Congress intended the conduct involved to be unregulated because the conduct should be left to be controlled by the free play of economic forces. The Court reasoned that " '[f]or a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.' " 427 U.S. at 144 (quoting *Garner v. Teamsters Union*, 346 U.S. 485, 74 S. Ct. 161, 98 L. Ed. 228 (1953)). The Court determined that the crucial inquiry is whether the exercise of state power to curtail or prohibit self-help mechanisms will frustrate the implementation of the NLRA's processes.

In resolving this issue, we find guidance from the Supreme Court's holding in *Belknap, Inc. v. Hale*, 463 U.S. 491, 103 S. Ct. 3172, 77 L. Ed. 2d 798 (1983). In *Belknap, Inc.*, the U.S. Supreme Court addressed the question of whether the NLRA preempted a misrepresentation and breach of contract action brought against an employer, in state court, by strike replacement workers who were displaced by reinstated strikers after they had been offered and had accepted jobs on a permanent basis, assured they would not be fired to accommodate returning strikers.

Belknap, Inc., was a corporation selling hardware products and building materials. A bargaining unit consisting of all of Belknap's warehouse and maintenance employees selected the International Brotherhood of Teamsters as their collective bargaining representative. In 1975, the union and Belknap entered into an agreement which was scheduled to expire on January 31, 1978. Negotiations were underway to renew the CBA but, shortly before the expiration of the agreement, an impasse occurred. As a result, on February 1, approximately 400 union employees went on strike.

To continue operating, Belknap granted a wage increase for those union employees who stayed on the job and, in addition, placed an advertisement in the local newspaper seeking applicants to " 'permanently replace striking warehouse and maintenance employees.' " 463 U.S. at 494. After each replacement worker was hired, Belknap presented to the replacement worker the following statement for his or her signature: " 'I, the undersigned, acknowledge and agree that I as of this date have

been employed by Belknap, Inc. at its Louisville, Kentucky, facility as a regular full time permanent replacement to permanently replace ___ in the job classification of ___.' " 463 U.S. at 494-95.

On March 7, 1978, the union filed unfair labor practice charges against Belknap. The charge was based on the wage increase granted by Belknap. On April 4, the company distributed a letter which stated, in pertinent part:

> " 'TO ALL PERMANENT REPLACEMENT EMPLOYEES
>
> . . . .
>
> " 'We recognize that many of you continue to be concerned about your status as an employee. The Company's position on this matter has not changed nor do we expect it to change. You will continue to be permanent replacement employees so long as you conduct yourselves in accordance with the policies and practices that are in effect here at Belknap.
>
> . . . .
>
> " 'We continue to meet and negotiate in good faith with the Union. It is our hope and desire that a mutually acceptable agreement can be reached in the near future. However, we have made it clear to the Union that we have no intention of getting rid of the permanent replacement employees just in order to provide jobs for the replaced strikers if and when the Union calls off the strike.' "

463 U.S. at 495.

On April 27, 1978, the regional director of the NLRB also "issued a complaint against Belknap, asserting that the wage increase violated §§ 8(a)(1), 8(a)(3), and 8(a)(5) of the [NLRA]." *Id.* Also on April 27, company officials again addressed the strike replacement workers and stated:

> " 'We want to make it perfectly clear, once again, that there will be no change in your employment status as a result of the charge by the National Labor Relations Board, which has been reported in this week's newspapers.
>
> " 'We do not believe there is any substance to the charge and we feel confident we can prove in the courts satisfaction that our intent and actions are completely within the law.' "

Belknap, Inc. v. Hale, 463 U.S. 491, 496, 103 S. Ct. 3172, 77 L. Ed. 2d 798 (1983).

A hearing on the unfair labor practice charges was scheduled for July 19, 1978. At the hearing, the regional director explained that if a settlement agreement could be reached, he would withdraw the unfair labor practice charges. During these discussions, the parties made various concessions, leaving one major issue unresolved, the recall of the striking employees. The parties finally agreed that the company would reinstate 35 strikers per week. The settlement agreement was then reduced to writing. Belknap proceeded to lay off the replacement workers to make room for the returning strikers.

The replacement workers sued Belknap in state court for misrepresentation and breach of contract. Belknap, after unsuccessfully seeking to remove the suit to federal court, moved for summary judgment on the ground that

the replacement workers' causes of action were preempted by the NLRA. The trial court agreed and granted summary judgment. The Kentucky Court of Appeals reversed the trial court's order, concluding the suit was not preempted because the contract and misrepresentation claims were of only peripheral concern to the NLRA and were not deeply rooted in local law. The Kentucky Supreme Court granted discretionary review, but later vacated its order. The U.S. Supreme Court granted Belknap's petition for certiorari and affirmed the Kentucky Court of Appeals' decision.

The Court initially conducted an overview of the preemption doctrines articulated in *San Diego Unions* [sic] *v. Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959), and *Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976). The Court then proceeded to determine whether the misrepresentation or breach of contract claims was preempted under *Machinists*. In so doing, the Court considered whether allowing such suits to proceed in state court would disrupt the delicate balance of forces established by federal law. The Court rejected this suggestion and noted that to allow an employer's otherwise valid promise of permanent employment to be nullified by federal law and to deny an otherwise valid contract claim would make little or no sense. The Court specifically stated that when an employer attempts to exercise the privilege of hiring permanent replacement workers by telling them that

> they will not be discharged to make room for returning strikers, it surely does not follow that the employer's otherwise valid promises of permanent employment are nullified by federal law

> and its otherwise actionable misrepresentations may not be pursued. . . . We find unacceptable the notion that the federal law on the one hand insists on promises of permanent employment if the employer anticipates keeping the replacements in preference to returning strikers, but on the other hand forecloses damages suits for the employer's breach of these very promises.

463 U.S. at 500.

The Court in *Belknap, Inc.*, then stated that holding that federal law intends to leave employers and unions free to use their economic weapons against one another is one thing, but holding that either the employer or the union is also free to injure innocent third parties without regard to the normal rules of law governing those relationships is quite another.

The Court also discarded the claim that such suits will interfere with the asserted policy of the NLRA. The Court stated that such a suggestion "is just another way of asserting that the employer need not answer for its repeated assurances of permanent employment or for its otherwise actionable misrepresentations to secure permanent replacements." 463 U.S. at 501. The Court concluded that the misrepresentation and breach of contract actions were not preempted under *Machinists* because Congress did not intend such conduct to be unregulated and that permitting such actions to proceed in state court would not substantially impair the self-help remedies left to combatants in labor disputes.

The Court in *Belknap, Inc.*, then turned to determining whether the claims should be preempted by *Garmon*.

The Court began by stating that under the *Garmon* preemption doctrine, a state may regulate conduct that is of only peripheral concern to the NLRA or that is so deeply rooted in local law that the courts should not assume Congress intended to preempt the application of state law. The Court then discussed prior Supreme Court precedent where the Court determined that the state law cause of action was not preempted by federal labor law. The Court discussed the holdings in *Linn v. Plant Guard Workers*, 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966) (state cause of action for false and malicious statements); *Farmer v. Carpenters*, 430 U.S. 290, 97 S. Ct. 1056, 51 L. Ed. 2d 338 (1977) (state cause of action for intentional infliction of emotional distress); and *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 98 S. Ct. 1745, 56 L. Ed. 2d 209 (1978) (state cause of action for trespass). From these cases, the Court determined that the critical inquiry was whether the conduct at issue or the controversy presented was identical to that which could be presented to the NLRB. In the prior cases, the Court in *Belknap, Inc.*, stated the controversies could not be called identical because the facts and issues to be addressed in state court would not be the same as those examined in an NLRB action. The Court determined that the facts and issues presented by the misrepresentation and breach of contract actions in the case at bar would also not be identical to an NLRB action, and specifically stated that whether the strike was an unfair labor practice strike and whether the offer made to replacement workers was the kind of offer forbidden during such a dispute were matters for the NLRB. The Court stated, however, that the focus of these determinations would be on whether the rights of

the strikers were being infringed, and determined that neither controversy would have anything in common with the question of whether Belknap made misrepresentations to replacement workers that were actionable under state law – the NLRB would be concerned with the impact on the strikers, not with whether the employer deceived the replacement workers.

The Court additionally noted that state courts clearly have a substantial interest in protecting their citizens from misrepresentations causing grievous harm. The Court noted that the injury remedied by state law has no relevance to the NLRB's function, as the NLRB cannot award damages, impose penalties, or provide any other relief. It therefore concluded that the causes of action were not preempted because maintaining a misrepresentation action would not interfere with the NLRB's determination of matters within its jurisdiction and that such an action is of no more than peripheral concern to the NLRB and the federal labor law. *Belknap, Inc. v. Hale*, 463 U.S. 491, 103 S. Ct. 3172, 77 L. Ed. 2d 798 (1983).

Considering the Supreme Court's holding in *Belknap, Inc.*, we find that appellants' cause of action based on the alleged oral contract is preempted by the NLRA. While the facts of *Belknap, Inc.*, seem to suggest that the breach of contract claim would not be preempted, we find the facts in *Belknap, Inc.*, distinguishable from those in the case at bar. In *Belknap, Inc.*, the employer promised the replacement workers nothing more than permanent employment. In the instant case, AS Mid-America promised the replacement workers not only permanent

employment, but also protection from harassment, discrimination, and intimidation. These promises of harassment-free employment were made by AS Mid-America officials. The failure to fulfill these promises and/or the condonation of the acts committed by the union employees is actually or arguably prohibited by the NLRA. *San Diego Unions* [sic] *v. Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959). See, also, *Newport News Shipbuilding & Dry Dock Company*, 236 NLRB 1499, 1508-09 (1978) (holding that "[b]y acquiescing in, condoning, ratifying, and failing to resist the illegal acts and conduct of the [union], Respondent Employer has contributed assistance and support to [the union], and thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(2) of the [NLRA]"); *Brewton Fashions, Inc., a Division of Judy Bond*, 145 NLRB 99, 127 (1963) (holding that "[t]he [NLRA] imposes an affirmative duty upon an employer to insure that his obligation to maintain discipline in the plant and to provide his employees with the opportunity to work without interference from their coworkers, is not delegated or surrendered to any union or antiunion group, and an employer who acquiesces in the exclusion of employees from his plant by such a group will be regarded as having discriminated against the excluded employees in violation of Section 8(a)(3)"). As a consequence, such conduct and/or failure to act is not merely a peripheral concern to federal labor law, but, rather, is so inextricably intertwined with federal labor law that to do other than preempt appellants' alleged breach of contract claims would obfuscate the NLRB's ability to adjudicate controversies committed to the NLRB by the NLRA. Moreover, the conduct at issue

and the controversy presented is identical to that which would be presented to the NLRB. The conduct attributed by appellants to AS Mid-America – the failure to protect its employees from harassment – would be, if proved, both a breach of the putative oral contract and a violation of federal labor law. Therefore, the focus of the state law breach of contract action and NLRB determinations would be the same – whether AS Mid-America acted or failed to act such that its replacement workers were subjected to harassment. We find that appellants' alleged oral contract claims are preempted by the NLRA.

Considering our standard of review in cases where summary judgment was granted based on a jurisdictional defect, we find the district court did not abuse its discretion in denying appellants the opportunity to replead. As demonstrated above, appellants' breach of contract claim is preempted by the NLRA. We find that the district court was correct in granting summary judgment regarding this issue and in denying appellants the opportunity to replead.

We will now address the first cause of action stated in appellants' second amended petition. Appellants claim the statements contained in the return to work resolution, that there shall be no harassment or intimidation, created a contract between the unions and AS Mid-America which appellants are entitled to benefit from as third-party beneficiaries. AS Mid-America responds by claiming that the return to work resolution is a contract within the purview of § 301 and is therefore preempted. The question then becomes whether the return to work resolution is a contract within the meaning of § 301. This question was addressed and resolved by the U.S.

Supreme Court in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985), and *Retail Clerks v. Lion Dry Goods*, 369 U.S. 17, 82 S. Ct. 541, 7 L. Ed. 2d 503 (1962).

In *Allis-Chalmers Corp.*, the Court recognized that the preemptive force of § 301 cannot be limited to only the terms of CBAs. The Court stated that "[i]f the policies that animate § 301 are to be given their proper range . . . the pre-emptive effect of § 301 must extend beyond suits alleging contract violations." *Allis-Chalmers Corp.*, 471 U.S. at 210. The Court went on to state:

> The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise ~~in the~~ context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract.

Allis-Chalmers Corp., 471 U.S. at 211. From the Supreme Court's holding, we determine that § 301 does not apply only to CBAs, or those agreements arrived at through the collective bargaining process.

In *Retail Clerks v. Lion Dry Goods, supra,* the Supreme Court addressed a similar issue as in the present case. In *Lion Dry Goods,* a labor strike erupted when negotiations for the renewal of a new CBA ended in an impasse. Negotiation and mediation subsequently proceeded, ultimately resulting in a strike settlement agreement containing various provisions intended to facilitate returning the strikers to work. In particular, the strike settlement agreement contained a provision which stated, in pertinent part, that "[n]o employee will be discriminated against, by reason of Union activities, membership or non-membership." 369 U.S. at 21 n.4. Other provisions in the strike settlement agreement addressed, but were not limited to, seniority, reinstatement, wage and hour schedules, working conditions, union membership, and other benefits. The strike settlement agreement was essentially " 'the basis on which the heretofore existing dispute . . . [wa]s to be fully and finally resolved.' " 369 U.S. at 22. After negotiating these provisions and agreeing to the reciprocal promises contained therein, the strike settlement agreement was agreed upon and the labor dispute was terminated. A few months later, however, a new dispute arose, precipitating an appeal to the U.S. Supreme Court.

The issue on appeal was whether the strike settlement agreement was a contract within the purview of § 301. In resolving this issue, the Court in *Lion Dry Goods* began by noting that both the U.S. District Court and the U.S. Court of Appeals for the Sixth Circuit viewed the crucial question as whether the strike settlement agreement constituted a contract contemplated by § 301. The Supreme Court read the lower courts' rulings as basically holding that there are only certain kinds of contracts

within the purview of § 301 and that the strike settlement agreement was not one of them. The Court read the lower courts' holdings as meaning that to be within § 301, contracts must either be collective bargaining agreements or agreements arrived at through the collective bargaining process. The Court rejected this interpretation of § 301 and specifically stated that the plain words of the statute negated such a narrow construction. *Retail Clerks v. Lion Dry Goods*, 369 U.S. 17, 82 S. Ct. 541, 7 L. Ed. 2d 503 (1962). The Court determined that the purpose of § 301 would be defeated if such contracts were excluded from those cognizable under § 301. *Id.* The Court explained that if these types of agreements were determined to be unenforceable under § 301, labor relations would suffer and the ultimate goal of minimizing disruption of interstate commerce would be made more difficult. The Court noted that "[i]t is no answer that in a particular case the agreement might be enforceable in state courts: a main goal of § 301 was precisely to end 'checkerboard jurisdiction.' " 369 U.S. at 27. The Court concluded that it need not decide whether the strike settlement agreement is a collective bargaining agreement, but, rather, it is enough that the strike settlement agreement is an agreement between employers and unions significant to industrial peace. The Court ruled that the strike settlement agreement was within the purview of § 301 because the agreement was created as a means to facilitate and regulate industrial peace, i.e., to terminate the labor strike and the picketing, and to return the strikers to their jobs.

The Supreme Court's holding in *Lion Dry Goods* controls. In the instant case, as in *Lion Dry Goods*, a labor strike ensued and a mutual agreement was reached,

intending to return working conditions to normal. As in *Lion Dry Goods*, the return to work resolution was a mutual agreement that AS Mid-America and union members negotiated and agreed upon, which essentially ended the strike and returned working conditions to normal. Just as in *Lion Dry Goods*, the return to work resolution addressed several issues significant to reestablishing and maintaining industrial peace, such as seniority, job classification, and job placement. The return to work resolution also provided mechanisms for resolving a number of other issues, such as layoffs, overtime, vacations, grievance procedures, and shift bumping.

We believe that the return to work resolution, just as the strike settlement agreement in *Lion Dry Goods*, falls within the purview of § 301. The return to work resolution was an agreement between the unions and AS Mid-America and was significant to maintaining industrial peace. The return to work resolution was mutually agreed upon with the intentions of ending the strike and returning working conditions to normal. As the return to work resolution resolved a labor controversy and arose out of the employment relationship, the return to work resolution plainly falls within the ambit of § 301. As such, any reliance by appellants upon the return to work resolution, directly or via third-party beneficiary rights, is preempted by federal labor law. We therefore find that appellants' claims based on the return to work resolution are preempted by § 301 of the LMRA and need not be analyzed.

Appellants' second cause of action is based on an implied contract premised on AS Mid-America's rules of conduct. Appellants claim that by issuing each new

employee a copy of the rules of conduct upon hiring, AS Mid-America entered into an implied contract whereby the company agreed to enforce the rules of conduct. Appellants claim AS Mid-America breached this implied contract by failing to discipline other employees in accordance with the rules and by permitting the returning strikers to conduct a campaign of harassment against appellants. AS Mid-America responds by claiming that the rules of conduct constitute part of the terms and conditions of employment at AS Mid-America. AS Mid-America argues that the application of the rules of conduct are subject to challenge through the grievance procedure contained in the CBA and, as such, are preempted by § 301.

As discussed above, the rules of conduct address three levels of employee misconduct; intolerable violations, major violations, and minor violations, each having different punishable offenses and degrees of punishment. Each new employee was given a copy of the rules upon hiring, along with an "Employee Acknowledgment Receipt" form, which indicated the employee had read and understood the rules. AS Mid-America argues the rules of conduct are part and parcel of the CBA and, in turn, any claim based on the rules is preempted by § 301.

The record discloses that at the time the rules were issued to these new employees, no CBA was in effect. A strike had erupted, and the CBA failed to exist as of April 27, 1993. Essentially, then, AS Mid-America suggests that the rules of conduct were meaningless and had no binding legal effect until the new CBA was in place, May 13. We do not agree. Rather, from our own holdings, we

know that employee handbooks, rules, and oral representations can be the bases for a contractual obligation with or without the existence of a CBA. See, e.g., *Overmier v. Parks*, 242 Neb. 458, 495 N.W.2d 620 (1993); *Hebard v. AT&T*, 228 Neb. 15, 421 N.W.2d 10 (1988); *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 408 N.W.2d 261 (1987); *Jeffers v. Bishop Clarkson Memorial Hosp.*, 222 Neb. 829, 387 N.W.2d 692 (1986). In addition, § 301 has no bearing on the validity or invalidity of such individual employment contracts. As the Supreme Court stated in *Caterpillar Inc. v. Williams*, 482 U.S. 386, 395, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987), "[s]ection 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.' . . . Section 301 says nothing about the content or validity of individual employment contracts." See, e.g., *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985). Moreover, the Supreme Court has stated that to determine whether a particular state law cause of action is preempted by § 301, a court must ascertain whether the resolution of the state law claim is dependent upon the construction of the collective bargaining agreement. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988). Here, the rules of conduct could in no way be dependent upon a construction of the CBA because the CBA did not exist when the rules of conduct were issued. Appellants' implied contract claims based on the rules of conduct are not preempted by § 301.

However, even if § 301 does not preempt appellants' state contract claim based on the rules of conduct, such

agreements are only enforceable if they meet the requirements of a contract. See *Overmier, supra.* In *Overmier,* we said that the language relied upon must contain "an offer definite in form which is communicated to the offeree, and the offer is accepted and consideration furnished for its enforceability. . . . " *Id.* at 462, 495 N.W.2d at 623. We also stated that there must also be a binding mutual understanding between the parties to the alleged contract. *Overmier, supra.* See, e.g., *Woods v. Woods,* 177 Neb. 542, 129 N.W.2d 519 (1964).

In the present case, the rules of conduct contain no clear offer of definite employment. The rules address nothing other than employee discipline. There is also no evidence in the record that either party understood the rules of conduct as creating an implied contract. We find the language contained in the rules of conduct is insufficient to rise to the level of an offer of employment. Therefore, appellants' second basis of recovery lacks merit and fails to create a genuine issue of material fact.

Appellants' third cause of action is premised on an alleged unilateral contract formed when the letter authored by Hiser was distributed to all employees after the strike ended. The letter summarized the prior oral promises made to each individual applicant during the initial hiring stage that they would be able to work in an environment free from harassment, intimidation, or discrimination. The letter stated these promises in terms of the return to work resolution. However, the record reflects that the return to work resolution actually summarized the prior oral promises made by AS Mid-America to appellants.

We have already determined that the alleged oral contract and the return to work resolution are preempted by federal labor law. Because the Hiser letter essentially summarized the promises contained in the oral contract and the return to work resolution that are both preempted, the Hiser letter is also preempted. We find that appellants' third cause of action is preempted by the NLRA and presents no further need for review.

In the fourth cause of action, appellants claim AS Mid-America committed fraudulent misrepresentation when the company made specific promises regarding job permanency that the company knew were false. To recover in an action for fraud based on misrepresentation of a material fact, a plaintiff must prove that (1) the defendant represented a material fact; (2) the represented fact was untrue; (3) the defendant knew that the represented fact was untrue, recklessly made the representation as a positive assertion without knowledge concerning the truth of the representation, or made the representation negligently as the result of a lack of reasonable care in ascertaining the fact represented or in the absence of skill and competence required by a particular business or profession; (4) the misrepresentation was made with the intention that the plaintiff would rely on it; (5) the plaintiff reasonably relied on the misrepresentation; and (6) as the result of such reliance, the plaintiff was damaged. *Ed Miller & Sons, Inc. v. Earl*, 243 Neb. 708, 502 N.W.2d 444 (1993); *Broekemeier Ford v. Clatanoff*, 240 Neb. 265, 481 N.W.2d 416 (1992).

The record discloses sufficient evidence which presents a genuine issue of material fact. First, AS Mid-America did in fact make representations to appellants

that they would have permanent employment in a harassment-free environment. Second, given the facts present in the instant case, AS Mid-America did not, in fact, protect appellants. Third, although there is no evidence or testimony indicating that AS Mid-America knew the represented facts were untrue, the record contains evidence indicating that AS Mid-America knew that the harassment, intimidation, and discrimination were occurring; yet, the company either ignored the conduct or passively condoned the conduct. Fourth, the record shows that AS Mid-America made the representations with the intention that appellants would rely on them; AS Mid-America knew that the only way the company could obtain workers during the strike was to promise job applicants that no harassment or intimidation would occur or be tolerated. Finally, the record shows that appellants relied on these representations and were damaged as a result. We find that appellants' claim for fraudulent misrepresentation presents a genuine issue of material fact.

Whether this claim is preempted under federal labor law is another question. Neither § 301 nor the NLRA preempts appellants' cause of action for fraudulent misrepresentation. Appellants' claim does not involve a contract between a labor organization and an employer; thus, § 301 is not implicated. Similarly, in *Belknap, Inc. v. Hale*, 463 U.S. 491, 103 S. Ct. 3172, 77 L. Ed. 2d 798 (1983), the U.S. Supreme Court held that a claim for misrepresentation is not preempted by the NLRA. In so holding, the Court initially noted that state courts clearly have a substantial interest in protecting their citizens from misrepresentations causing grievous harm. The Court further

noted that the injury remedied by state law has no relevance to the NLRB's function, as the NLRB cannot award damages, impose penalties, or give any other relief. The Court concluded that the cause of action was not preempted because maintaining a misrepresentation action would not interfere with the NLRB's determination of matters within its jurisdiction and that such an action is of no more than peripheral concern to the NLRB and the federal labor law.

We find that the district court erred in granting summary judgment regarding appellants' claims for fraudulent misrepresentation as appellants' claims state a cause of action for fraudulent misrepresentation and the claim is not preempted by federal labor law.

In the fifth cause of action, appellants claim AS Mid-America caused intentional infliction of emotional distress by permitting the union employees to harass and intimidate the nonunion employees. To recover for intentional infliction of emotional distress, the plaintiff must show that (1) there has been intentional or reckless conduct, (2) the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) the conduct caused emotional distress so severe that no reasonable person should be expected to endure it. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993); *Gall v. Great Western Sugar Co.*, 219 Neb. 354, 363 N.W.2d 373 (1985).

In this regard, appellants claim AS Mid-America caused them intentional infliction of emotional distress by permitting union employees to conduct a campaign of

harassment and intimidation. Although it is a fact that harassment and intimidation occurred on and off AS Mid-America premises, the conduct which appellants complain of was not perpetrated by AS Mid-America, but, rather, by the union employees. To hold AS Mid-America responsible for the wrongdoings of the union members is a step which cannot be made absent a special relationship. See, *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998); *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994). Even if we set aside the special relationship requirement and determine that AS Mid-America could be held responsible for the union members' wrongdoings, none of the acts perpetrated by the union members were so outrageous in character and so extreme in degree as to be regarded as atrocious and utterly intolerable. See, *Nichols, supra; Gall, supra*. This court is unable to exclaim the required word, "outrageous." *Gall*, 219 Neb. at 364, 363 N.W.2d at 379-80 (holding that "[l]iability for the tort of outrage . . . exist[s] when, '[g]enerally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" ' "). The record is lacking even a scintilla of evidence indicating any of the appellants suffered from severe emotional distress. We therefore find that appellants' fifth cause of action lacks merit and does not create a genuine issue of material fact.

In sum, appellants' alleged oral contract claims and their first, second, third, and fifth causes of action lack merit and need not be reviewed on remand. However, we

reverse, and remand on the fraudulent misrepresentation issue.

REVERSED AND REMANDED.

CAPORALE, J., not participating in the decision.

STEPHAN, J., not participating.

APPENDIX B

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

EARL FOREMAN,

Plaintiff,

vs

AS MID-AMERICA, INC. a corporation,

Defendant.

AS MID-AMERICA, INC.,

Defendant/ Third-Party Plaintiff,

vs.

GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, LOCAL NO. 543-M AND GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, LOCAL NO. 221.

Third-Party Defendants.

Docket 508, Page 274.

ORDER

Statement of the Case

This case is before the Court on Defendant's motion for summary judgment. Under Neb. Rev. Stat. sec. 25-1332 (1995), a summary judgment "shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of

law. . . . " A summary judgment is only proper when the pleadings, depositions, admission [sic], stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inference that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Sanitary and Imp. Dist. No. 157 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995). The party moving for summary judgment bears the burden of establishing that it is entitled to judgment as a matter of law, based on material evidence in the record about which there is no genuine issue of fact. *Alder v. First National Bank and Trust Co.*, 241 Neb. 873, 876, 491 N.W.2d 686, 688-89 (1992). To defeat the motion, the party opposing summary judgment has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party. *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996). In reviewing a summary judgment, the Court must take the view of the evidence most favorable to the party against whom the motion is directed and give that party the benefit of all favorable inferences which may be drawn from the evidence. *Yankton Prod. Credit Assn. v. Larsen*, 219 Neb. 610, 365 N.W.2d 430 (1985).

Statement of Facts

Plaintiffs were hired by Defendant, AS Mid-America, in May, 1993 to replace Defendant's striking union employees. Hired as replacement workers in an effort to continue operations during the strike, Plaintiffs were

promised by Defendant that they would have a permanent job and work in an environment free from harassment and intimidation. The Company also urged regular, pre-strike employees ("crossovers") to cross the picket line and continue to work despite the union-sponsored strike.

Both the strike replacements and crossovers were subject to the same employment policies that were in effect prior to the strike. Each employee was given a copy of the company's Rules of Conduct when they were hired and asked to sign an "Employee Acknowledgment Receipt" which stated that they understood and would observe the rules. The Rules of Conduct prohibited acts of violence, coercion, intimidation, or discrimination by one employee against another.

On May 13, the Unions ratified new collective bargaining agreements and settled their dispute with defendant. As part of their settlement, defendant and its Union entered into a Return to Work Resolution wherein they agreed that there would be no intimidation, discrimination or harassment of employees on the basis of their participation or non-participation in the strike.

In the days following the strike settlement, AS Mid-America's Division Director, Dennis Hiser, held employee meetings wherein he and other management personnel told the employees that there would be no intimidation, discrimination or harassment of any employees and that any such harassment would be strictly disciplined. Additionally, a letter was distributed to all employees which read as follows:

> The Return to Work Resolution also contains a commitment from both the Company and the Unions that 'there shall be no intimidation, discrimination, or harassment because of any person's participation or non-participation in the strike.' It is essential for the future success of our operation that all parties strictly abide by this provision. Management of the Company will be closely monitoring the behavior of all employees to make sure that this provision is enforced. Any intimidation, discrimination, or harassment which does occur will be dealt with swiftly, and those individuals responsible will be subject to appropriate discipline.

Despite AS Mid-America's promise of an environment free from intimidation, discrimination, and harassment, both during the strike and once the strikers returned to the plant, union employees began harassing and intimidating the permanent replacement and crossover workers. Although management received constant complaints concerning the union harassment, the company did not respond or react to the complaints and the harassment continued.

Plaintiffs never filed a formal grievance to protest the company's alleged failure to shield them from harassment. By express reference in the Resolution, any disputes arising under the terms of the Resolution must be resolved through a grievance procedure. Under the terms of the collective bargaining agreements between AS Mid-America and the Unions, any discipline imposed by the company is subject to challenge through an exclusive and finally binding grievance and arbitration procedure.

However, Plaintiffs were never informed of such a procedure but only told to inform their supervisors when such harassment occurred.

Additionally, Plaintiffs failed to file unfair labor practice charges as required by the National Labor Relations Board (NLRB) protesting the alleged harassment by the returning strikers or the Defendant's alleged "ratification" and "confirmation" of that harassment.

Discussion

Plaintiffs' state law contract and tort claims arising out of AS Mid-America's failure to provide a work environment free from intimidation and harassment are preempted by the primary jurisdiction of the National Labor Relations Board ("NLRB"). The United States Supreme Court strictly prohibits state and local regulation of activities that are "protected by sec. 7 of the [National Labor Relations Act], or constitute an unfair labor practice under sec. 8," *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959), with the critical inquiry being "whether the controversy presented to the state court is identical with that which could be presented to the [NLRB]." *Belkanp, Inc. v. Hale*, 463 U.S. 489, 510 (1983).

Plaintiffs' causes of action are preempted under the *Garmon* preemption doctrine, as the above test is commonly referred, because their controversy could have been presented to the NLRB. In *Newport News Shipbuilding*, 236 N.L.R.B. 1499, 1506-07 (1978) (citations omitted) (quoting *Brewton Fashions, Inc., A Division of Judy Bond*, 145 N.L.R.B. 99, 127 (1963), *enf'd*, 361 F.2d 8 (5th Cir. 1966), *cert. denied*, 385 U.S. 842 (1966)), the NLRB held

that an employer violated sec. 8(a)(2) of the Act by "acquiescing in, condoning, ratifying and failing to resist the illegal act and conduct of [union members]." *Id.* at 1508-09. Therefore the Act precludes the very conduct by Defendant about which Plaintiffs complain:

> The Act [NLRA] imposes an affirmative duty upon an employer to insure that his obligations to maintain discipline in the plant and to provide his employees with the opportunity to work without interference from their co-workers is not delegated or surrendered to any union or anti-union group, and an employer who acquiesces in the exclusion of employees from his plant by such a group will be regarded as having discriminated against the excluded employees in violation of Section 8(a)(3).

Id. at 1506-07.

Here, extremely similar to the situation in *Newport News*, Plaintiffs wish to enforce Defendant's promise to provide a permanent job free from harassment and intimidation. Allowing Plaintiffs to enforce Defendant's promises under state law would directly interfere with the NLRB's ability to adjudicate controversies under the Act, thereby intruding into an area Congress and the United States Supreme Court have specifically given to the NLRB in its interest to prevent states from setting standards of conduct inconsistent with the substantive requirements of the Act, or from providing their own remedies for conduct prohibited by the Act. *See Building and Construction Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 113 S. Ct. 1190, 1195 (1993). In short, Plaintiffs' causes of actions are

identical with that which could be presented to the NLRB. The claims cannot be brought in this court.

THEREFORE, the motion for summary judgment is granted. Petition is dismissed. Costs taxed against the Plaintiff.

DATED this 30 day of January, 1997.

BY THE COURT:

/s/ Earl J. Witthoff
Earl J. Witthoff
District Court Judge

cc: Susan I. Strong, attorney for Plaintiff
Joseph S. Turner & Kenneth C. Stephan, attorneys for Defendant/Third-Party Plaintiff
Lynette Z. Boyle, attorney for Third-Party Defendant, GCIU Local #543-M
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APPENDIX C

STATUTES INVOLVED

Section 7 of the National Labor Relations Act provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157 (1998).

Section 8(a) of the National Labor Relations Act provides, in pertinent part:

> (a) It shall be an unfair labor practice for an employer –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

29 U.S.C. § 158(a) (1998).

Section 301 of the Labor Management Relations Act provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1998).

98-1008

No. _____

Supreme Court, U.S.
FILED
FEB 18 1999
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In The

Supreme Court of the United States

October Term, 1998

EARL FOREMAN, et al.,

Petitioners,

vs.

AS MID AMERICA, INC., A Corporation,

Respondent.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

OPPOSITION TO PETITION FOR CERTIORARI 1

COUNTER STATEMENT OF THE CASE 4

I. Relevant Facts..... 4

REASONS WHY THE WRIT SHOULD BE DENIED .. 6

I. The Nebraska Supreme Court's Holding That Plaintiffs' Oral Contract Claims Are Preempted Under The *Garmon* Doctrine Does Not Warrant Review By This Court..... 6

A. The Nebraska Supreme Court's *Garmon* Preemption Analysis Is Ill-Suited For Supreme Court Review 8

B. The Nebraska Supreme Court's Holding Faithfully Adhered To This Court's *Garmon* Preemption Principles 9

C. The Nebraska Supreme Court Properly Concluded *Belknap* Is Inapplicable On Its Facts... 12

D. The Nebraska Supreme Court's Preemption Analysis Is Not Out-Dated 14

II. The Nebraska Supreme Court's Conclusion That Section 301 Pre-Empts Plaintiffs' Third Party Beneficiary Claim Is Unremarkable And In Accord With Longstanding Supreme Court Precedent 19

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1995)..... 24

Belknap, Inc. v. Hale, 463 U.S. 491 (1983) 7, 8, 11, 12, 13, 14

Brewton Fashions, Inc., A Division of Judy Bond, 145 N.L.R.B. 99 (1963), *enf'd*, 361 F.2d 8 (5th Cir. 1966), *cert. denied*, 385 U.S. 842 (1966)..... 10

Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54, 468 U.S. 491 (1984)..... 15

Building & Trades Council v. Associated Builders, 507 U.S. 218 (1993) 7

Carr v. Pacific Maritime Association, 904 F.2d 1313 (9th Cir. 1990), *cert. denied*, 498 U.S. 1084 24

Caterpillar v. Williams, 482 U.S. 386 (1987) 7

Escanaba Paper Co., 314 N.L.R.B. 732 (1994)..... 17

Farmer v. Carpenters, 430 U.S. 290 (1977).. 15, 16, 17, 18

International Longshoremens Association, AFL-CIO v. Davis, 476 U.S. 380 (1986) 15

Iron Workers v. Perko, 373 U.S. 701 (1963).....14, 15

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988)..... 24

Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53 (1966) 18

Livadas v. Bradshaw, 512 U.S. 107 (1994) 23, 24

Local 926, International Union of Operating Engineers v. Jones, 460 U.S. 669 (1983) ...10, 14, 15, 16, 18

TABLE OF AUTHORITIES – Continued

Page

NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938) 12

Newport News Shipbuilding, 236 N.L.R.B. 1499 (1978) 10, 11

Oklahoma Allied Telephone Co., 210 N.L.R.B. 916 (1974) 9

Pattern Makers League of North America v. NLRB, 473 U.S. 95 (1985) 9

Retail Clerks v. Lion Dry Goods, 369 U.S. 17 (1962) 3, 20, 21, 22, 24

San Diego Building Trades Council v. Garmon, 359 U.S 236 (1959) ..... *passim*

Sears, Roebuck and Co. v. San Diego County District Council of Carptenters, 436 U.S. 180 (1978) ... 7, 11, 15

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 19

STATUTES

29 U.S.C. § 157 ..... 6, 9

29 U.S.C. § 158 6

29 U.S.C. § 158(a)(1) 9, 11

29 U.S.C. § 160 18

29 U.S.C. § 185 19

OPPOSITION TO PETITION FOR CERTIORARI

This is an unexceptional case involving the straightforward application of federal preemption principles. The fourteen petitioners (collectively, "Plaintiffs") are former employees of Respondent AS Mid-America, Inc. ("AS Mid-America" or the "Company"), who worked for the Company during a strike in 1993. They filed suit against AS Mid-America seeking recovery for the Company's alleged failure to protect them from harassment directed toward them by returning strikers. Their lawsuits set forth five separate claims for relief. The first cause of action asserts a breach of Plaintiffs' third party beneficiary rights under a strike settlement agreement called the "Return to Work Resolution." The second cause of action asserts a breach of an oral contract based on the Company's alleged promises of permanent employment in a harassment-free workplace. The third cause of action claims breach of an implied unilateral contract of employment based on AS Mid-America's Rules of Conduct. Plaintiffs' fourth and fifth causes of action allege claims for fraudulent misrepresentation and intentional infliction of emotional distress respectively. Plaintiffs seek damages for lost wages and benefits, future earnings and emotional distress.

AS Mid-America moved for summary judgment on all of Plaintiffs' claims, on the grounds that they were preempted by the National Labor Relations Act ("NLRA") and by Section 301 of the Labor Management Relations Act ("Section 301"). AS Mid-America also argued that Plaintiffs' claims had no merit as a matter of state law.

On January 30, 1997, the Lancaster County district court granted the Company's motion for summary judgment on the grounds that the NLRA preempted all of Plaintiffs' claims. The district court did not address the Company's additional arguments for granting summary judgment.

On September 25, 1998, in a carefully considered opinion, the Nebraska Supreme Court affirmed summary judgment on all but one of Plaintiffs' claims. The court held that the NLRA preempted Plaintiffs' oral contract claim, because the Company's failure to provide Plaintiffs with a harassment-free workplace was actually or arguably prohibited by the NLRA.[1] The court then concluded that Section 301 preempted Plaintiffs' third party beneficiary claim because that claim required interpretation of a strike settlement agreement. The court dismissed Plaintiffs' implied contract and intentional infliction of emotional distress claims as lacking merit under state law. The court, however, remanded Plaintiffs' fraudulent misrepresentation claim to the district court for further proceedings.

No compelling reason warrants granting Plaintiffs' petition for certiorari. Plaintiffs' argument that the

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[1] Plaintiffs alleged that the promises of a harassment-free workplace were also embodied in a letter from Dennis Hiser, the Company's Division Director, to all employees. The Nebraska Supreme Court concluded that, because the Hiser letter essentially summarized the promises of a harassment-free workplace, the Hiser letter was also preempted by the NLRA. (App. 30).

Nebraska Supreme Court misapplied Supreme Court precedent on the preemption of state law claims by the National Labor Relations Act does not provide compelling grounds for Supreme Court review. See S. Ct. R. 10. Further, the Nebraska Supreme Court did not depart from Supreme Court precedent, but instead faithfully adhered to the principles outlined in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). The court correctly held Plaintiffs' oral contract claims were preempted because they sought to adjudicate important rights guaranteed and governed by the NLRA – namely, the fundamental rights of employees under Section 7 of the NLRA to participate, or refrain from participating, in activities associated with labor unions.

Plaintiffs' contention that their third party beneficiary contract claim raised an important Section 301 preemption issue "which has not yet been decided by this Court" (Pet. at 8) is equally unworthy of Supreme Court review. Far from deciding an issue of first impression, the Nebraska Supreme Court merely applied this Court's longstanding holding in *Retail Clerks v. Lion Dry Goods*, 369 U.S. 17 (1962): claims founded on rights contained in a strike settlement agreement, such as Plaintiffs' claim here, are preempted by Section 301. In short, there is nothing about this case that warrants or justifies review by this Court.

COUNTER STATEMENT OF THE CASE

I. Relevant Facts

AS Mid-America operates a commercial printing plant in Lincoln, Nebraska. In 1993, the Lincoln plant employed approximately 690 hourly bargaining unit workers. The workers were represented by Graphics Communication International Union, Locals 520 and 221, and International Association of Machinists Local 31 (the "Unions").

On April 27, 1993, these hourly workers began a strike against the Company.[2] In an effort to continue operations during the strike, AS Mid-America hired replacement employees ("strike replacements"). The Company also urged regular, pre-strike employees ("crossovers") to cross the picket line and continue to work despite the union-sponsored strike. By the conclusion of the strike on May 13, the Company had hired approximately 46 strike replacements, and approximately 83 employees had abandoned the strike and returned to work as crossovers.

On May 13, the Unions ratified new collective bargaining agreements and a strike settlement agreement called the "Return to Work Resolution." The Resolution effectively terminated the strike and provided for mechanisms designed "to return Company operations to normal." Toward that purpose, the parties added a provision

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[2] Dates refer to 1993 unless otherwise noted.

in the Resolution which stated: "There shall be no intimidation, discrimination, or harassment because of any person's participation or non-participation in the strike."

Under the terms of the collective bargaining agreements between AS Mid-America and the Unions, any contractual disputes, including disputes over Company imposed discipline, was subject to challenge through an exclusive and binding grievance and arbitration procedure. By express reference in the Resolution, any disputes arising under the terms of the Resolution also had to be resolved through the grievance procedure.

The day after the strike ended (May 14), AS Mid-America's Division Director, Dennis Hiser, distributed a letter to all employees which discussed relevant terms of the strike settlement. Hiser's letter reiterated:

> The Return to Work Resolution also contains a commitment from both the Company and the Unions that "there shall be no intimidation, discrimination, or harassment because of any person's participation or non-participation in the strike." It is essential for the future success of our operation that all parties strictly abide by this provision. Management of the Company will be closely monitoring the behavior of all employees to make sure that this provision is enforced. Any intimidation, discrimination, or harassment which does occur will be dealt with swiftly, and those individuals responsible will be subject to appropriate discipline.

In accordance with the principles of the letter, the Company formally disciplined former strikers on several occasions for acts of harassment against strike replacements. In four cases, that discipline was challenged

through the grievance and arbitration procedure and referred to an arbitrator. In one instance, discipline imposed by the Company was upheld, and in three instances the discipline was overturned.

Plaintiffs were all either strike replacements or crossovers (13 strike replacements; 1 crossover). Twelve of the fourteen Plaintiffs resigned their employment sometime after May 13, one was terminated for poor performance, and one was laid off. Plaintiffs filed no grievances protesting the Company's alleged failure to shield them from harassment. Nor did they file any unfair labor practice charges with the National Labor Relations Board ("NLRB") protesting the alleged harassment by the returning strikers or the Company's alleged "ratification" of that harassment.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Nebraska Supreme Court's Holding That Plaintiffs' Oral Contract Claims Are Preempted Under The *Garmon* Doctrine Does Not Warrant Review By This Court

The first issue presented for review "is a variant of a familiar theme." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 239 (1959). Under what is commonly referred to as the *Garmon* preemption doctrine, this Court forbids state and local regulation of activities that are "protected by § 7 of the [National Labor Relations Act], or constitute an unfair labor practice under § 8." *Id.* at 244. *See also* 29 U.S.C. §§ 157, 158. The rationale behind *Garmon* preemption is straightforward: allowing the states to

regulate conduct within "the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." *Garmon*, 359 U.S. at 244. "[T]he *Garmon* rule prevents states not only from setting standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." *Building & Trades Council v. Associated Builders*, 507 U.S. 218, 225 (1993) (citing *Wisconsin Dept. of Industry v. Gould, Inc.*, 475 U.S. 282, 286 (1986)).

"*Garmon* preemption prohibits regulation even of activities that the NLRA only *arguably* protects or prohibits." *Building & Construction Trades Council*, 507 U.S. at 225 (emphasis in original). Thus, if the same facts supporting a breach of an employment contract or tort claim would arguably constitute an unfair labor practice under the NLRA, state court jurisdiction must yield to the NLRB. *See Caterpillar v. Williams*, 482 U.S. 386, 397-98 (1987). The critical inquiry in deciding whether a matter is *Garmon* pre-empted is "whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board." *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 197 (1978); *accord Belknap, Inc. v. Hale*, 463 U.S. 491, 510 (1983). Where the controversies are identical, as they are here, state court jurisdiction is prohibited. *Sears*, 436 U.S. at 197.

A. The Nebraska Supreme Court's *Garmon* Preemption Analysis Is Ill-Suited For Supreme Court Review.

Over a span of ten pages, the Nebraska Supreme Court carefully and thoroughly analyzed *Garmon* and its progeny. (App. 12-22). In particular, the court found "guidance" from this Court's decision in *Belknap*. (App. 14). As Plaintiffs concede, the court "examined the facts of *Belknap* in detail." (Pet. at 13). Based on its interpretation of *Belknap*, the Nebraska Supreme Court found that Plaintiffs' oral contract claims were preempted by the NLRA. (App. 20).

Plaintiffs claim that the Nebraska Supreme Court's holding "is contrary to United States Supreme Court precedent and policy on the preemption of replacement workers' state law claims by the National Labor Relations Act" (Pet. at 8). A petition for writ of certiorari, however, "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10. Yet, the Nebraska Supreme Court's purported misapplication of a properly stated rule of law – namely, this Court's *Garmon* preemption rule as set forth in *Belknap* – is exactly what Plaintiffs ask this Court to review. Supreme Court Rule 10 explicitly declares Plaintiffs' claim to be inappropriate for review by this Court.

B. The Nebraska Supreme Court's Holding Faithfully Adhered To This Court's *Garmon* Preemption Principles

Even if Plaintiffs' oral contract claim was appropriate for review, it is clear that the Nebraska Supreme Court correctly applied this Court's preemption doctrine to conclude that the NLRA preempted that claim. Section 7 of the NLRA provides employees with the right to "refrain" from union or concerted activities, including the right to refuse to engage in a strike. *See* 29 U.S.C. § 157; *Pattern Makers' League of North America v. NLRB*, 473 U.S. 95, 101 (1985) ("[w]hen employee members of a union refuse to support a strike . . . , they are refraining from 'concerted activity' "). Section 8(a)(1) in turn prohibits an employer from interfering with an employee's right to refrain from engaging in such protected activities. *See* 29 U.S.C. § 158(a)(1).[3] That prohibition includes placing an affirmative duty on an employer not to acquiesce in the subjugation of one group of employees' rights by another:

> [t]he [NLRA] imposes an affirmative duty upon an employer to insure that his obligations to maintain discipline in the plant and to provide his employees with the opportunity to work without interference from their co-workers is not delegated or surrendered to any union or

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[3] *See also Oklahoma Allied Telephone Co.*, 210 N.L.R.B. 916, 921 (1974) ("[t]he statute means that the right to refrain from union or concerted activities is as important as the right to engage in union or concerted activities. For an employer to interfere with the exercise of either right is equally objectionable").

> anti-union group, and an employer who acquiesces in the exclusion of employees from his plant by such a group will be regarded as having discriminated against the excluded employees in violation of Section 8(a)(3).

Brewton Fashions, Inc., A Division of Judy Bond, 145 N.L.R.B. 99, 127 (1963), *enf'd*, 361 F.2d 8 (5th Cir. 1966), *cert. denied*, 385 U.S. 842 (1966); *see also Newport News Shipbuilding*, 236 N.L.R.B. 1499, 1509-09 (1978) (holding that the employer violated Section 8(a)(2) of the Act by "acquiescing in, condoning, ratifying and failing to resist the illegal acts and conduct of [union members]").

Here, Plaintiffs claim that AS Mid-America failed to protect them from the harassment and interference of their co-workers, which resulted from Plaintiffs' exercise of their Section 7 right not to participate in the strike. As the Board recognized in *Newport News* and *Brewton Fashions*, Section 8(a)(1) places an affirmative duty on the Company not to acquiesce in the subjugation of Plaintiffs' Section 7 rights by their co-workers.[4] Thus, the Nebraska

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[4] Plaintiffs' attempts to distinguish *Newport News* and *Brewton Fashions* are unpersuasive. That neither case discussed preemption or involved employees bringing state law claims against their employer (Pl. Pet. at 14-15) is hardly surprising, as the NLRB does not hear state law claims. If anything, Plaintiffs' observations merely confirm that their claims seek to impinge on "the exclusive jurisdiction of the Board over matters arguably within the reach of the Act." *Local 926, International Union of Operating Engineers v. Jones*, 460 U.S. 669, 680 (1983). Moreover, while Plaintiffs argue that *Newport News* and *Brewton Fashion* merely address "controversies between competing unions and their employer" (Pet. at 14), no such limitation is apparent from either of the Board's holdings. Further, implying

Supreme Court correctly concluded that AS Mid-America's "failure to fulfill these promises [of non-harassment] and/or the condonation of the acts committed by union officials is actually or arguably prohibited by the NLRA." (App. 21).

The Nebraska Supreme Court then addressed the critical inquiry: whether Plaintiffs' claims are identical to those that could have been presented to the NLRB. *Sears*, 436 U.S. at 197; *Belknap*, 463 U.S. at 510. As the Court noted, AS Mid-America's alleged failure to protect Plaintiffs from harassment would, if proved, not only constitute a breach of an oral agreement, but also a violation of federal labor law. (App. 22). *See also Newport News*, 236 NLRB at 1506-07; 29 U.S.C. § 158(a)(1). Moreover, "the focus of the state law breach of contract action and NLRB determinations would be the same – whether AS Mid-America acted or failed to act such that its replacement workers were subjected to harassment." (App. 22). Where the controversies are identical, as they are here, state court jurisdiction must yield. *Sears*, 436 U.S. at 197; *Belknap*, 463 U.S. at 510. Thus, the Nebraska Supreme Court's conclusion that the NLRA preempted Plaintiffs' oral contract claims is faithful to the analysis set forth in *Garmon* and its progeny.

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such a limitation would run counter to the language of the NLRA, which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of rights protected under Section 7 of the Act. 29 U.S.C. § 158(a)(1).

C. The Nebraska Supreme Court Properly Concluded *Belknap* Is Inapplicable On Its Facts

Despite this straightforward analysis, Plaintiffs maintain that the Nebraska Supreme Court disregarded this Court's holding in *Belknap*. To the contrary, the Nebraska Supreme Court found "guidance" from *Belknap*. (App. 14). As even Plaintiffs grudgingly concede, the Nebraska Supreme Court "examined the facts of *Belknap* in detail." (Pet. at 13). In *Belknap*, the employer promised its strike replacement workers that they would be retained beyond the conclusion of the strike. *Belknap*, 463 U.S. at 494-95. Indeed, strike replacements signed documents confirming that they were permanently replacing striking workers. *Id.* When the strike concluded, however, the employer reneged on its commitment to the strike replacements and laid them off in favor of the returning strikers. *Id.* at 496. The laid off replacements sued for breach of contract and misrepresentation.

In analyzing whether the replacement workers' claims were preempted by *Garmon*, this Court reiterated that the critical inquiry is "whether the controversy presented to the state court is identical with that which could be presented to the [NLRB]." *Belknap*, 463 U.S. at 510. Under the facts in *Belknap*, the focus of any NLRB proceeding would be whether the offer of permanent employment to the replacements violated the Section 7 rights of the *strikers* to be reinstated at the conclusion of an unfair labor practice strike. 463 U.S. at 509-10. Indeed, the NLRA precludes the permanent replacement of unfair labor practice strikers. *See NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938). Conversely, the controversy

brought before the state court focused on whether the discharge of the replacements at the end of the strike violated the rights of the *replacements*. Thus, the controversies were very different, one focusing on the propriety of hiring the replacements, and one focusing on the propriety of firing them. Significantly, the employer never contended that the act of discharging the replacements was an unfair labor practice. Accordingly, the Supreme Court refused to apply the *Garmon* doctrine under those facts.

The Nebraska Supreme Court correctly concluded that the facts in *Belknap* are "distinguishable from those in the case at bar." (App. 20). Here, Plaintiffs were not discharged or laid off at the conclusion of the strike as occurred in *Belknap*. Moreover, the nature of the alleged promise was different: "[i]n *Belknap, Inc.*, the employer promised the replacement workers nothing more than permanent employment. In the instant case, AS Mid-America promised the replacement workers not only permanent employment, but also protection from harassment, discrimination and intimidation." (App. 20). Indeed, the gist of Plaintiffs' complaint is that the Company allowed union employees to "conduct a campaign of harassment and intimidation against permanent replacement and cross-over workers." (Pet. at 3-4).

Thus, unlike in *Belknap*, resolution of the "critical inquiry" mandates preemption, because "the conduct at issue or the controversy presented was identical to that which could be presented to the NLRB." (App. 19). *See also Belknap*, 463 U.S. at 510. As the Nebraska Supreme Court concluded:

> The conduct attributed by appellants to AS Mid-America – the failure to protect its employees from harassment – would be, if proved, both a breach of the putative oral contract and a violation of federal labor law. Therefore, the focus of the state law breach of contract action and NLRB determinations would be the same – whether AS Mid-America acted or failed to act such that its replacement workers were subjected to harassment. (App. 21-22).

In short, far from being in direct conflict with *Belknap*, the Nebraska Supreme Court carefully distinguished *Belknap's* facts and applied *Belknap's* holding to conclude that the NLRA preempted Plaintiffs' claims in this case.[5]

D. The Nebraska Supreme Court's Preemption Analysis Is Not Out-Dated

Citing to a footnote in Chief Justice Rehnquist's dissent in *Local 926, Int'l Union of Operating Engineers v. Jones*, 460 U.S. 669 (1983), Plaintiffs next argue that the Nebraska Supreme Court's preemption analysis is "outdated." (Pet. at 15). That argument is entirely without merit. In his *Jones* dissent, Chief Justice Rehnquist merely observed that the preemption analysis set forth in *Iron*

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[5] Indeed, the Nebraska Supreme Court concluded that Plaintiffs' fraudulent misrepresentation claim was not preempted under *Belknap* because, unlike the breach of contract claim, "maintaining a misrepresentation action would not interfere with the NLRB's determination of matters within its jurisdiction and . . . such an action is of no more than peripheral concern to the NLRB and the federal labor law." (App. 32).

Workers v. Perko, 373 U.S. 701 (1963), was no longer dispositive, because in *Perko*, "the mere fact that a state law claim was based upon arguably prohibited conduct dictated the conclusion that the state law claim was preempted." *Jones*, 460 U.S. at 685 n.2 (Rehnquist, J. dissenting). Since then, the Court has emphasized that the critical inquiry in applying the *Garmon* rule "is whether the controversy presented by the state court is identical with that which could be presented to the Board." *Belknap*, 463 U.S. at 510.

That is the *exact* analysis that the Nebraska Supreme Court applied in this case to hold Plaintiffs' claims preempted. *See* App. 21-22 ("the conduct at issue and the controversy presented is identical to that which would be presented to the NLRB"). In fact, the Nebraska Supreme Court does not even mention *Perko* in its decision. In short, the court's analysis is entirely consistent with current *Garmon* preemption doctrine.

Plaintiffs also claim that the Nebraska Supreme Court ignored the "overwhelming exceptions" to the *Garmon* rule set forth in *Sears* and *Farmer v. Carpenters*, 430 U.S. 290 (1977). (Pet. at 16). That argument fundamentally misconstrues the scope of *Garmon* preemption. The exceptions to the *Garmon* rule "serve only as more precise demarcations of the scope of *Garmon* preemption. They have not redefined the nature of that preemption in any way." *International Longshoremen's Association, AFL-CIO v. Davis*, 476 U.S. 380, 381 (1986) (emphasis added) (noting that the rule is "[s]ubject to exception only in *limited* circumstances," *Id.* at 392-93); *see also Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468

U.S. 491, 502 (1984) ("a presumption of federal preemption applies even when the state law regulates conduct only arguably protected by federal law" and that this presumption "properly admits to exception when *unusually* 'deeply rooted' local interests are at stake") (emphasis added).

Moreover, both *Sears* and *Farmer* are inapposite. In *Sears*, "the state court action was for trespass. It challenged only the location of the Union picketing. The unfair labor practice charge, however, would have focused on whether the picketing had recognitional or work reassignment objectives, issues 'completely unrelated to the simple question whether a trespass had occurred.' " *Jones*, 460 U.S. at 682-83 (citing to *Sears*, 436 U.S. at 198).

Similarly, in *Farmer*, a union member brought an action for intentional infliction of emotional distress against the union and its officers, claiming that he was subjected to a campaign of personal abuse and harassment in addition to continued discrimination in referrals from the hiring hall. 430 U.S. at 292. This Court held that the NLRA did not preempt the intentional infliction claim, because the focus of any unfair labor practice proceeding "would be on whether the statements or conduct on the part of Union officials discriminated or threatened discrimination against him in employment referrals for reasons other than failure to pay Union dues." *Id.* at 304. By contrast, whether the union officers' statements or conduct also caused the plaintiff emotional distress and physical injury "would play no role in the Board's disposition of the case, and the Board could not

award [plaintiff] damages for pain, suffering, or medical expenses." *Id.*[6]

Thus, in both *Sears* and *Farmer*, the controversies were not identical, and preemption was unnecessary. By contrast, as the Nebraska Supreme Court observed here, "the focus of the state law breach of contract action and NLRB determinations would be the same – whether AS Mid-America acted or failed to act such that its replacement workers were subjected to harassment." (App. 22). Therefore, the threat of creating inconsistent obligations under state and federal law is very real. In their complaints, Plaintiffs specifically contend that the Company breached a contract and acted tortiously by, among other things, allowing union members "to come to work wearing union T-shirts," affix union bumper stickers to their (the union members) cars, etc. Plaintiffs seek to have a state court jury award them damages based on these allegedly wrongful acts. In fact, AS Mid-America would have clearly violated federal labor law had it forbidden or disciplined union members for wearing union T-shirts or placing union bumper stickers on their cars. *See Escanaba Paper Co.*, 314 N.L.R.B. 732, 733 (1994) (employees wearing T-shirts or buttons stating "No Scabs" protected by Section 7 of the NLRA). Avoiding this exact type of situation is precisely the reason the *Garmon* doctrine was recognized by the United States Supreme Court, and requires the dismissal of Plaintiffs' claims. Therefore,

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[6] Significantly, the Nebraska Supreme Court did not conclude that Plaintiffs' intentional infliction claims in this case were preempted, but instead held that they failed to state a cognizable claim under state law. (App. 32-33).

unlike in *Sears* and *Farmer*, the danger of creating state law obligations which conflict with the federal scheme is overriding, and placing the controversy solely within the jurisdiction of the NLRB is necessary.[7]

Finally, Plaintiffs claim that they seek "monetary damages which the Board cannot provide." (Pet. at 19). In fact, however, the Board is entitled to provide employees with back pay relief, the very kind of monetary damages that Plaintiffs could obtain in their breach of contract claim. *See generally* 29 U.S.C. § 160. Regardless, "since remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict." *Garmon*, 359 U.S. at 247, 79 S. Ct. at 781. *See also Jones*, 460 U.S. at 684, 103 S. Ct. at 1463 (rejecting plaintiff's argument that he should be permitted to go forward in the state court because he could be awarded punitive damages and attorneys' fees, whereas he would be limited to backpay if his complaint had gone forward before the Board). Moreover, Plaintiffs had the option of seeking broader remedies by filing suit against those they claim

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[7] *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966), has no bearing on this case. In *Linn*, this Court held that a state action for malicious libel in the course of a labor dispute was not preempted, because the malicious publication of libelous statements does not in and of itself constitute an unfair labor practice. *Id.* at 63. Moreover, while such statements arguably could constitute a violation of Section 8 of the NLRA, the Board would look only to the coercive or misleading nature of the statements rather than their defamatory quality. *Id.* Thus, unlike here, the focus of the state and Board proceedings would not be the same.

perpetrated acts of violence and intimidation against them. Their decision to forego such suits does not exempt them from the application of the *Garmon* preemption doctrine in the lawsuit they chose to file against their former employer.

II. The Nebraska Supreme Court's Conclusion That Section 301 Pre-Empts Plaintiffs' Third Party Beneficiary Claim Is Unremarkable And In Accord With Longstanding Supreme Court Precedent

As a second reason for granting the writ, Plaintiffs argue that whether their breach of contract claims survive preemption under Section 301 "is an issue which has not yet been decided by this Court." (Pet. at 21). To the contrary, this Court has long held that Section 301 preempts breach of contract claims arising out of a strike settlement agreement, such as the Return to Work Resolution in this case.

Section 301 specifically vests the federal courts with subject matter jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . " 29 U.S.C. § 185. To avoid the potential for creating inconsistent obligations under state and federal law, federal law must be applied to suits involving contracts covered by Section 301. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957) ("[T]he substantive law to apply in suits under Section 301 is federal law, which the courts must fashion from the policy of our national labor laws.")

In *Retail Clerk's International Association, Local Unions Nos. 128 and 633 v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962), this Court held that strike settlement agreements are contracts between an employer and a labor organization within the meaning of Section 301. In *Lion Dry Goods*, the employer and its union negotiated a strike settlement agreement which contained a non-discrimination provision and an arbitration provision concerning disputes arising under the strike settlement agreement. *Id.*, 369 U.S. at 20 n.4.[8] A dispute arose under the strike settlement agreement and the parties arbitrated that dispute. *Id.* at 23. Subsequently, the employer refused to abide by the arbitration award and the union filed suit under Section 301. *Id.* The union argued that the strike settlement agreement constituted a contract for purposes of Section 301. Conversely, the employer argued that only certain types of contracts (*i.e.* collective bargaining agreements) satisfy the contract requirement of Section 301. *Id.* at 23-25.

This Court determined that a strike settlement agreement was a contract covered by Section 301:

> We find, then, from a reading of the words of § 301(a), both in isolation and in connection with the statute as a whole, no basis for denying jurisdiction of the action based upon the alleged violation of the "strike settlement agreement."

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[8] The non-discrimination clause in *Lion Dry Goods* is quite similar to the one in the Resolution: "[n]o employee will be discriminated against, by reason of Union activities, membership or non-membership. All employees will continue to have job security and no employee will be discharged except for just cause." *Id.* at 20 n.4.

> Furthermore, the statute's purpose would be defeated by excluding such contracts from "contracts" cognizable under § 301(a). If this kind of strike settlement were not enforceable in § 301(a), responsible and stable labor relations would suffer, and the attainment of the labor policy objective of minimizing disruption of interstate commerce would be made more difficult. It is no answer that in a particular case the agreement might be enforceable in state courts: a main goal of § 301 was precisely to end "checkerboard jurisdiction."

Id. at 27 (internal citations omitted).

Therefore, the Nebraska Supreme Court's conclusion that Section 301 preempted Plaintiffs' third party beneficiary claims under the Return to Work Resolution merely constituted a straightforward application of *Lion Dry Goods'* holding:

> In the instant case, as in *Lion Dry Goods*, a labor strike ensued and a mutual agreement was reached, intending to return working conditions to normal. As in *Lion Dry Goods*, the return to work resolution was a mutual agreement that AS Mid-America and union members negotiated and agreed upon, which essentially ended the strike and returned working conditions to normal. Just as in *Lion Dry Goods*, the return to work resolution addressed several issues significant to reestablishing and maintaining industrial peace, such as seniority, job classification, and job placement. The return to work resolution also provided mechanisms for resolving a number of other issues, such as layoffs, overtime, vacations, grievance procedures, and shift bumping. (App. 25-26).

Plaintiffs concede that the right they seek to enforce "is included in a strike settlement agreement between Defendant and its unions." (Pet. at 27). They also recognize that *Lion Dry Goods* "extended Section 301 to include claims founded directly on rights arising out of a strike settlement agreement in addition to claims alleging the violation of a collective bargaining agreement." (Pet. at 23). Nevertheless, they inexplicably argue that their third party beneficiary claim based on the Resolution escapes *Lion Dry Goods'* holding because, in *Lion Dry Goods*, "the strike settlement agreement resembled a traditional collective bargaining agreement." (Pet. at 23). But *Lion Dry Goods* expressly rejected that same argument:

> It is argued that Congress limited § 301(a) jurisdiction to contracts that are "collective bargaining contracts," meaning, so runs the argument, only agreements concerning wages, hours, and conditions of employment concluded in direct negotiations between employers and unions entitled to recognition as exclusive representatives of employees.
>
> The words of § 301(a) require no such narrow construction as is suggested; rather they negate it.

369 U.S. at 25. The contract at issue in *Lion Dry Goods* was a strike settlement agreement between an employer and a union. The Resolution at issue here is a strike settlement agreement between an employer and a union. Without question, the Resolution is a labor contract which must be interpreted by applying principles of federal labor law.

Nevertheless, Plaintiffs contend that none of the policies underlying *Lion Dry Goods* would be furthered by

preempting Plaintiffs' claims in this case. Citing to *Livadas v. Bradshaw*, 512 U.S. 107 (1994), they contend that Section 301's preemption principles are limited to the policy of preserving the effectiveness of arbitration clauses in collective bargaining agreements. (Pet. at 24-25). Thus, they argue, because they are "nonunion" employees who were not parties to a collective bargaining agreement, their state law claims are not arbitrable and should be resolved under state law. (Pet. at 23-25).

Plaintiffs fundamentally misunderstand the principles behind Section 301 preemption. Nothing in *Livadas* limits the scope of Section 301 preemption to enforcement of arbitration provisions. Rather, *Livadas* re-affirmed that the preemption rule applies to assure that state laws do not determine "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement." *Livadas*, 512 U.S. at 122-23 (internal citations omitted). Thus, Plaintiffs' status as nonunion members is irrelevant to the preemption analysis; rather, "it is the *legal character* of a claim, as 'independent' of rights under the collective-bargaining agreement, . . . that decides whether a state cause of action may go forward." *Livadas*, 512 U.S. at 123-24 (emphasis added) (internal citations omitted).[9] *See*

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[9] In *Livadas*, plaintiff brought a claim contending that the defendant had willfully failed to pay her wages promptly upon severance, in violation of California state law. This Court noted that there was no dispute over the amount of the penalty to which the plaintiff would be entitled. *Id.* at 125. Therefore, beyond the simple need to refer to bargained-for wage rates in computing the penalty, the collective bargaining agreement was irrelevant to the dispute and there was no reason to hold the

also Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 407 (1988) (state law claims are "independent" for § 301 preemption purposes only if "resolution of the state-law claim does not require construing the collective-bargaining agreement"). That analysis applies equally to strike settlement agreements such as the Return to Work Resolution. *Lion Dry Goods*, 369 U.S. at 25.

In this case, Plaintiffs' claims are not "independent" of the Return to Work Resolution. To the contrary, they arise *out of* the Resolution (Pet. at 27). Thus, "any attempt to assess liability here inevitably will involve contract interpretation." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 218 (1995) (holding state law tort claim pre-empted because the duties imposed by the state tort derived from the rights and obligations established by the labor contract). Therefore, Section 301 preempts Plaintiffs' claims.

Moreover, even under Plaintiffs' strained interpretation of *Livadas*, their claims still would be subject to preemption. By express reference in the Return to Work Resolution, any disputes arising under the terms of the Resolution had to be resolved through the grievance procedure. Therefore, their third party beneficiary claim *does* impact on the enforceability of arbitration promises. *Cf. Carr v. Pacific Maritime Association*, 904 F.2d 1313, 1315-16 (9th Cir. 1990), *cert. denied*, 498 U.S. 1084 (failure of non-union casual employees covered under collective bargaining agreement to exhaust grievance procedure barred claim under Section 301). In short, Plaintiffs' claims are

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state law claim pre-empted under Section 301. *Id.* Thus, unlike in this case, the *Livadas* plaintiff's claims did not arise out of the labor agreement.

clearly preempted and must be resolved by applying principles of federal labor law.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 12 1999
OFFICE OF THE CLERK

No. 98-1008

In The

Supreme Court of the United States

October Term, 1998

EARL FOREMAN, et al.,

Petitioners,

vs.

AS MID-AMERICA, INC., A Corporation,

Respondent.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REASONS FOR GRANTING THE WRIT..... 1

I. CONTRARY TO THE NEBRASKA SUPREME COURT'S DECISION, *BELKNAP* DICTATES THAT PLAINTIFFS' CLAIMS CANNOT BE PREEMPTED UNDER THE NATIONAL LABOR RELATIONS ACT..... 1

A. PLAINTIFFS' CLAIMS ARE EVEN MORE "DEEPLY ROOTED IN LOCAL FEELING AND RESPONSIBILITY" THAN THE CLAIMS HELD NOT PREEMPTED IN *BELKNAP* 1

B. THE NEBRASKA SUPREME COURT'S DECISION IS IN DIRECT CONFLICT WITH *BELKNAP*..... 3

C. THERE IS NO REALISTIC RISK OF INTERFERENCE WITH JURISDICTION OF THE NLRB..... 7

II. PLAINTIFFS' STATE LAW CLAIMS SHOULD NOT BE PREEMPTED BY THE LABOR MANAGEMENT RELATIONS ACT..... 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) . . 9, 10

Belknap, Inc. v. Hale, 463 U.S. 491 (1983) . . . . . *passim*

Branson v. Greyhound Lines, Inc., 126 F.2d 747 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 1362 (1998) 3, 8

Brewton Fashions, Inc., a Division of Judy Bond, 145 N.L.R.B. 99 (1963), *enf'd*, 361 F.2d 8 (5th Cir.), *cert. denied*, 385 U.S. 842 (1966) 7

Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54, 468 U.S. 491 (1984) 5

Cannon v. Edgar, 33 F.3d 880 (7th Cir. 1994) 3

Escanaba Paper Co., 314 N.L.R.B. 732 (1994). 5

Farmer v. Carpenters, 430 U.S. 290 (1977) 4, 5, 6, 8

Krzycki v. Genoa Nat'l Bank, 242 Neb. 819, 496 N.W.2d 916 (1993) 7

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988) 9

Linn v. Plant Guard Workers, 383 U.S. 53 (1966) 4

Livadas v. Bradshaw, 512 U.S. 107 (1994). 9

Newport News Shipbuilding & Dry Dock Co., 236 N.L.R.B. 1499 (1978). 7

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) 3, 6

Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978) 4, 5, 6, 8

TABLE OF AUTHORITIES – Continued

Page

STATUTES

29 U.S.C. § 157 (1998) 1

29 U.S.C. § 158 (1998) 1

29 U.S.C. § 160 (1998) 7

29 U.S.C. § 185 (1998) 1

OTHER AUTHORITIES

Jeremy P. Sherman, *Bargaining Over The Terms And Conditions For Striker Replacements: Is The NLRB About To Change The Rules?*, 47 Labor Law Journal 178 (March 1996) 9

REASONS FOR GRANTING THE WRIT

The Nebraska Supreme Court held, in direct conflict with *Belknap v. Hale,* 463 U.S. 491 (1983), that Plaintiffs' breach of contract claims are preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 157 & 158 (1998), and in so doing, wrongly deprived Plaintiffs of their state law rights. App. 21-22. In defending the decision of the Nebraska Supreme Court, Defendant attempts to characterize Plaintiffs' claims as discrimination charges under the NLRA, but Plaintiffs' contract claims cannot be distinguished from those already held not preempted in *Belknap.* Plaintiffs' claims are simple, common-law breach of contract claims by non-union replacement workers, which are distinct from any possible National Labor Relations Board ("NLRB") claim, and as this Court held in *Belknap,* do not interfere with the jurisdiction of the NLRB and cannot be preempted. *Id.* at 509.

The Nebraska Supreme Court's preemption of Plaintiffs' third-party beneficiary contract claims under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 (1998), does nothing to promote the policies behind federal labor law preemption, but only serves to further deprive Plaintiffs of their state law rights. App. 26. Defendant argues that the issue of whether Plaintiffs' third-party beneficiary contract claims can be preempted by Section 301 of the LMRA is unremarkable. Yet, Defendant cannot cite any authority from this Court which discusses whether a non-union replacement worker's claims can be preempted by Section 301. The issue is one of first impression in this Court and should be decided in this case.

I. CONTRARY TO THE NEBRASKA SUPREME COURT'S DECISION, *BELKNAP* DICTATES THAT PLAINTIFFS' CLAIMS CANNOT BE PREEMPTED UNDER THE NATIONAL LABOR RELATIONS ACT.

A. PLAINTIFFS' CLAIMS ARE EVEN MORE "DEEPLY ROOTED IN LOCAL FEELING AND RESPONSIBILITY" THAN THE CLAIMS HELD NOT PREEMPTED IN *BELKNAP.*

Defendant cannot distinguish Plaintiffs' claims from those held not preempted in *Belknap.* 463 U.S. at 398. The only factual

distinction, as the Defendant boldly points out, is that the Plaintiffs in this case were not laid off as in *Belknap*, but were constructively discharged by the harassment they were forced to endure. The gist of Defendant's argument is that the claims in *Belknap* were based on the employer's breach of its contract of permanent employment, while the claims in this case are based not only on Defendant's breach of a contract of permanent employment, but on Defendant's breach of its contract to protect the replacement workers from harassment. Defendant argues that since it has not only breached its contract for permanent employment with Plaintiffs, but has also arguably committed an unfair labor practice, the case is distinguishable from *Belknap*, and Plaintiffs' claims therefore preempted.

As Justice Blackmun stated in *Belknap*: "If federal law recognizes that the employer voluntarily has undertaken an obligation to the replacements, the fact that the employer commits an unfair labor practice making it impossible for it to fulfill that obligation should not shield the employer from compensating the replacement employees." *Id.* at 522 (Blackmun, J., concurring).

In this case, Defendant chose to allow the Plaintiffs to be constructively discharged by union harassment rather than lay them off as in *Belknap*, in an attempt to avoid the very claims made by the Plaintiffs in this lawsuit and the very dilemma contemplated by this Court in *Belknap*. *See id.* at 502-505. Defendant now seeks to hide behind federal labor law preemption to avoid the consequences of its unsavory employment practices against innocent third parties, arguing that it should be allowed to do so because it not only broke its promises to the replacement employees, it arguably committed an unfair labor practice by allowing the union to harass the Plaintiffs. This Court expressly rejected that argument in *Belknap*, *id.* at 508 n.12, and should do so here as well.

Defendant's alleged factual distinction only serves to underscore that the actions taken against the permanent replacement workers by the Defendant in this case were even more egregious than those taken by the employer in *Belknap*, and thus Plaintiffs' claims even more "deeply rooted in local feeling and responsibility." *See Belknap, id.* at 498.

B. THE NEBRASKA SUPREME COURT'S DECISION IS IN DIRECT CONFLICT WITH *BELKNAP*.

The Nebraska Supreme Court ignored the principal holding of this Court's decision in *Belknap* when it failed to recognize that Plaintiffs' claims touch interests deeply rooted in local law and cannot be preempted by federal labor law. As this Court held in *Belknap*, whether or not the employer arguably committed an unfair labor practice is not the end of *Garmon* preemption analysis. 463 U.S. at 498, citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 238 (1959). *See also Branson v. Greyhound Lines, Inc.*, 126 F.3d 747, 751 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 1362 (1998). Yet the Nebraska Supreme Court ended its analysis when it found that "the focus of the state law breach of contract action and NLRB determinations would be the same – whether AS Mid-America acted or failed to act such that its replacement workers were subjected to harassment." App. 22.

In defending the Nebraska Supreme Court's decision, Defendant argues that the court correctly applied this Court's *Garmon* preemption doctrine to conclude that the NLRA preempts Plaintiffs' breach of contract claims. However, what Defendant and the Nebraska Supreme Court fail to recognize is that "*Garmon* preemption . . . is not absolute. A claim is not preempted under *Garmon* [even if the conduct in question is arguably an unfair labor practice,] if the regulated activity is (1) merely of peripheral concern to the federal labor laws or (2) touches interests deeply rooted in local feeling and responsibility." *Cannon v. Edgar*, 33 F.3d 880, 884 (7th Cir. 1994) (citing *Belknap*, 463 U.S. at 498).

In *Belknap*, this Court allowed replacement workers to maintain state law breach of contract claims against a company which promised them permanent employment but then fired them to make room for returning strikers. 463 U.S. at 495-97. The employer's contention that the employees' breach of contract suit was preempted "because it related to . . . conduct that was part and parcel of an arguable unfair labor practice" was expressly rejected. *Id.* at 510. The Court

stated that even in the face of an explicit Board order directing an employer to violate contracts made with replacement workers, "the suit for damages for breach of contract could still be maintained without in any way prejudicing the jurisdiction of the board or the interest of the federal law in insuring the replacement of strikers." *Id.* at 512. As the Court noted,

> The dissent asserts that to subject the unfair labor practice employer to damages suits would cause intolerable confusion, but as we see it there would be no interference with the Board's authority to impose its remedy for violating the federal labor law. Performing that function neither requires nor suggests that the replacements must be deprived of their remedy for breach of contract.

Id. at 508 n.12. The Court pointed out that it has allowed state law claims deeply rooted in local law to go forward even when the actions complained of constituted unfair labor practices within the jurisdiction of the NLRB:

> In *Linn v. Plant Guard Workers,* 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966), we held that false and malicious statements in the course of a labor dispute were actionable under state law if injurious to reputation, even though such statements were in themselves unfair labor practices adjudicable by the Board. Likewise, in *Farmer v. Carpenters,* 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977), we held that the Act did not preempt a state action for intentionally inflicting emotional distress, even though a major part of the cause of action consisted of conduct that was arguably an unfair labor practice.

Id. at 509-10. *See also Sears, Roebuck & Co. v. Carpenters,* 436 U.S. 180, 197 (1978) (state court action for trespass allowed even though objectives of picketing arguably constituted an unfair labor practice charge).

Defendant speciously argues that *Sears* and *Farmer* are inapposite because the state court actions in those cases were not identical to claims which could have been brought before

the NLRB. Opp. at 16. However, in this case, as in *Sears* and *Farmer,* the Plaintiffs' state court breach of contract claims are not identical to discrimination charges under the NLRA. Just as the objectives of the picketing in *Sears* can be distinguished from the picketing itself, so can the objectives of Defendant's acquiescence in the harassment be distinguished from the fact that the harassment occurred.[1] For further discussion see *infra,* Section C.

This Court's principal holding in *Belknap* dictates that state law claims which are deeply rooted in local law should not be preempted by federal labor law. *Id.* at 509. As Defendant admits, only a *presumption* of federal preemption applies when the state regulates conduct arguably protected by federal law; this presumption properly admits to exception when unusually deep rooted local interests are at stake. Opp. at 16, citing *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54,* 468 U.S. 491, 502 (1984). The Nebraska Supreme Court's preemption of Plaintiffs' claims is in direct conflict with *Belknap*, which held that Plaintiffs' claims are deeply rooted in local feeling and responsibility and cannot be preempted.

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[1] Plaintiffs' allegations (contained in their claim for intentional infliction of emotional distress which is not at issue before this Court) concerning returning strikers being allowed to wear union T-shirts and bumper stickers are taken out of context by the Defendant, Opp. at 17, and do not constitute the basis for Plaintiffs' breach of contract claims. More importantly, *Escanaba Paper Co.,* 314 N.L.R.B. 732 (1994) does not hold that the wearing of union T-shirts and bumper stickers are absolutely protected rights. The Board held that the employer's ban on such union items violated the NLRA only because the employer in that case had no evidence that the wearing of union T-shirts and buttons affected discipline, safety or production in its plant. *Id.* at 735. The Board acknowledged that in other cases, it has upheld the employer's prohibition of such union symbols. *Id.* at 738. In any event, in *Sears,* this Court stated that "permitting state courts to evaluate the merits of an argument that certain . . . activity is protected does not create an unacceptable risk of interference with conduct which the Board . . . would find protected." 436 U.S. at 205.

The flaw in the Nebraska Supreme Court's analysis is further demonstrated by the inconsistency in its opinion. Plaintiffs pled, as an alternative cause of action to their breach of contract claims, an action for fraudulent misrepresentation based on the same promises (or misrepresentations) as the breach of contract claims.

If the Nebraska Supreme Court properly followed *Belknap*, as Defendant contends, then how could it find that Plaintiffs' claims for breach of contract are preempted, but their claims for misrepresentation, based on the same facts, are not?[2] If Defendant's breach of its promises to protect Plaintiffs from harassment are preempted because their focus is identical to possible NLRB claims, then how can Defendant's misrepresentations that Plaintiffs would be protected from harassment not be preempted as well?

The answer is clear. In concluding that Plaintiffs' breach of contract claims are preempted, the Nebraska Supreme Court ignored this Court's holding in *Belknap* and failed to make the final and critical inquiry that *Sears, Farmer* and *Belknap* established as an exception to the *Garmon* preemption doctrine. The issue is not simply whether the focus of Plaintiffs' breach of contract claims is the same as claims which could have been brought before the NLRB – the final and critical inquiry is whether Plaintiffs' claims touch state and local interests deeply rooted in local feeling and responsibility, which cannot be preempted by federal law.

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[2] The court contradicted itself by holding that Plaintiffs' breach of contract claims can be distinguished from *Belknap* and are preempted because their focus is identical to claims which could have been brought before the NLRB, while at the same time holding that the misrepresentation claims cannot be distinguished from *Belknap*, do not interfere with NLRB jurisdiction, and are not preempted. App. 22, 32.

C. THERE IS NO REALISTIC RISK OF INTERFERENCE WITH THE JURISDICTION OF THE NLRB

Plaintiffs' state law claims are not identical to any claim which could have been brought before the NLRB and do not create any realistic risk of interference with the jurisdiction of the Board. Plaintiffs do not "claim that AS Mid-America failed to protect them from the harassment and interference of their co-workers, which resulted from Plaintiffs' exercise of their Section 7 right not to participate in the strike."[3] Opp. at 10. Plaintiffs seek recovery for Defendant's breach of its contracts to provide permanent employment for as long as Plaintiffs' wanted and to protect them from harassment.

To recover for breach of contract under Nebraska law, Plaintiffs need only prove the existence of a promise, its breach, and damages.[4] *Krzycki v. Genoa Nat'l Bank*, 242 Neb. 819, 828, 496 N.W.2d 916 (1993). Plaintiffs need not prove that their right to refrain from union or concerted activities under the NLRA was infringed upon by their employer. In this case, the replacement workers' actions against their former employer concern whether Defendant breached its promises to protect them from harassment and provide them with permanent employment for as long as they wanted, not whether the objectives of their employer violated federal law.

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[3] *Newport News Shipbuilding & Dry Dock Co.*, 236 N.L.R.B. 1499 (1978) and *Brewton Fashions, Inc., a Division of Judy Bond*, 145 N.L.R.B. 99 (1963), *enf'd*, 361 F.2d 8 (5th Cir.), *cert. denied*, 385 U.S. 842 (1966), establish only that an employer's acquiescence in union harassment constitutes an unfair labor practice under Section 7 of the NLRA. That issue is irrelevant to Plaintiffs' state court breach of contract action. "This Court, and not the Board, reviews state-court lawsuits said to conflict with federal law." *Belknap*, 463 U.S. at 517 n.3 (Blackmun, J., concurring).

[4] In this lawsuit, Plaintiffs seek lost wages and future earnings. As Defendant admits, the NLRB is limited in its remedies to providing back pay and reinstatement. *See* 29 U.S.C. § 160 (1998).

Plaintiffs are all non-union employees who have never filed charges of discrimination with the National Labor Relations Board. Although Defendant characterizes Plaintiffs' claims as discrimination charges under the NLRA, Plaintiffs have never alleged that they were discriminated against nor do they allege any claims against the unions or their members. Defendant's assertion that these replacement workers arguably could have filed charges with the NLRB, is not only unrealistic, but irrelevant to this state court action against their employer. As stated by the Fifth Circuit Court of Appeals in *Branson*,

> To assert that such replacement workers must bring their claims to the NLRB rather than to an appropriate court, seems to vest this federal administrative body with power over disputes purely private and independent of an unfair labor practice or collective bargaining agreement. . . . Federal labor law may create in represented employees a certain expectation and interest that an employer will abide by terms properly and unilaterally implemented during negotiations over a collective bargaining agreement. Nevertheless, the expectations of replacement employees, who trust that an employer will keep its promises, stem from the different and more traditional source of state contract law.

126 F.3d at 752.

In *Belknap*, this Court could have chosen to couch the replacement workers' claims in terms of discrimination charges, but instead, allowed the replacement workers' breach of contract and misrepresentation claims to go forward without regard to whether they *could* have stated their claims to fall with the proscribed acts under the NLRA. 463 U.S. at 510. *See also Farmer*, 430 U.S. at 290; *Sears*, 436 U.S. at 197. The Nebraska Supreme Court clearly erred in preempting Plaintiffs' claims for breach of contract under the NLRA, contrary to Supreme Court precedent.

II. PLAINTIFFS' STATE LAW CLAIMS SHOULD NOT BE PREEMPTED BY THE LABOR MANAGEMENT RELATIONS ACT

As non-union strike replacement workers, Plaintiffs were never parties to any collective bargaining agreement between Defendant and its unions. In fact, "an inherent conflict exists between the union's role as bargaining agent for the strikers and the interests of the striker replacements. This is not a conflict that might *sometimes* occur. It is a conflict which will *inevitably* occur. . . . " Jeremy P. Sherman, *Bargaining Over The Terms And Conditions For Striker Replacements: Is The NLRB About To Change The Rules?*, 47 Labor Law Journal 178, 179 (March 1996). It is that very conflict which not only prevents the employment of strike replacement workers from being the subject of a collective bargaining agreement, but makes it impossible for strike replacement workers to file a grievance with the union, and should exclude Plaintiffs' claims from preemption under Section 301 of the LMRA.

In *Allis-Chalmers v. Lueck*, 471 U.S 202, 213 (1985) and in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 410 (1988), this Court emphasized that § 301 cannot be read broadly to preempt nonnegotiable rights conferred on individual employees as a matter of state law. *See Livadas v. Bradshaw*, 512 U.S. 107, 123 (1994). *Belknap* establishes that Plaintiffs' strike replacement worker claims for breach of contract and mispreresentation are of only "peripheral concern" to federal labor law and that permitting these actions will not "frustrate any policy of the federal labor laws." *Belknap*, 463 U.S. at 509-12.

This Court has not yet decided the issue of whether Section 301 can be read broadly enough to preempt claims brought by non-union replacement workers, who clearly stand outside the collective bargaining process. The only federal courts which have addressed the issue have come to opposite conclusions. *See cases cited in* Pet. at 22. In this case, after Defendant removed Plaintiffs' causes of action for third-party beneficiary contract rights, the federal district court remanded the cases back to state court on Plaintiffs' motions, finding

the claims were not "completely preempted" under Section 301.

This Court has already held that "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by 301 or other provisions of the federal labor law." *Lueck*, 471 U.S. at 211. Other federal courts have allowed non-union plaintiffs to bring state law claims enforcing third-party beneficiary rights under collective bargaining agreements, reasoning that the policies behind federal labor law preemption do not apply to non-union plaintiffs. *See cases cited in* Pet. at 26.

Preempting Plaintiffs' non-union replacement workers' claims under Section 301 in this case will not promote collective bargaining nor preserve the effectiveness of arbitration.[5] As such, this Court should grant certiorari to decide that Plaintiffs' claims survive preemption under Section 301.

CONCLUSION

For the foregoing reasons, as well as those stated in their Petition For Writ Of Certiorari, Petitioners respectfully request that this Court grant certiorari to reverse the Nebraska Supreme Court's erroneous preemption of their claims, and restore their state law rights.

Respectfully submitted,

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[5] Defendant's argument that Plaintiffs' third-party beneficiary claims would impact the enforceability of arbitration procedures is irrelevant, *see* Opp. at 24, given the finding that Plaintiffs were told by management to report any harassment directly to their supervisors. App. 9-10.